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MILITARY LAW REVIEW

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PREFACE

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MILITARY LAW REVIEW

OBSERVATIONS ON THE OPERATION OF A UNIFIED COMMAND LEGAL OFFICE

BY COLONEL BLAND WEST*

In January 1968, General Lucius D. Clay was quoted by the Press as having told the Senate Preparedness Subcommittee that "no future commander is going to fight a war with the weapons of one service." This statement was made against a background of suggestions by other responsible and well-informed persons that our defense forces be reorganized so as to provide more "unified commands," composed of land, sea, and air units. These views impliedly give recognition to the fact that the joint force[1] has time and again proved to be an effective device for getting something done better by utilizing the combined efforts of components of two or more of the Armed Forces, and they portend that more joint forces may come into being.

What does this mean to Armed Forces lawyers, relatively few of whom have occupied a legal billet in a joint force? Nothing radical, if conditions remain generally as they are. Anyone qualified to hold a responsible position as a command staff judge advocate or legal officer in his own service would have no real difficulty in filling an equivalent position in today's prototype of joint force. Opportunities for gaining experience in such a position are limited, however, as there currently are very few joint force legal offices and even fewer engaged in what might be termed the "general practice" of military law.

The specific type of joint force known as a "joint task force"[2]

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* JAGC, U. S. Army, Staff Judge Advocate, Field Command, Armed Forces Special Weapons Project. The observations made hereinafter are not official, but are the writer's own. For their technical assistance in preparation of this article, grateful acknowledgment is made to the following members of the writer's office: Lieutenant Colonel James M. Stubbs, USAF, Deputy Staff Judge Advocate] and Lieutenant Harland B. Cope, USN, Assistant Staff Judge Advocate.

1 ***Joint Action Armed Forces,*** FM 110-5/JAAF/AFM 1-1, Sep 1961, as changed, par. 30201: ***"b. Joint Force.*** This is a general term applied to a force which is composed of significant elements of the Army, the Navy (Marine Corps), and the Air Force, or any two of these Services, operating under a single commander authorized to exercise unified command or operational control over such joint forces."

2 *Id.* par. 30256: **"A** joint **task** force is a joint force composed of assigned or attached elements of the Army, the Navy (Marine Corps), and the Air Force, or of any two of these Services, which is constituted and so designated by the Joint Chiefs of Staff, by the commander of a specified com-

is usually so little concerned with administration that its legal affairs can be handled entirely or in major part by the legal offices of subordinate or supporting units. The only other type of joint force commonly defined in current doctrine is the "unified command."[3]

The commander of a unified command exercises "command"[4] (not merely operational control) over the service components which make up his force, and he has a very considerable responsibility for coordinating the logistic and administrative support of the component forces of the unified command. He also is authorized to "exercise discipline of his entire command to the extent he deems necessary for military effectiveness."[5]

The principal unified commands in existence, such as our major joint force overseas commands, seem to fall within the descriptive orbit of the phrase "unified commands in strategic areas" used by the Congress in a statute pertaining to the Joint Chiefs of Staff.[6] They operate on a plateau which, according to some thinking, in-

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mand, by the commander of a unified command, or by the commander of an existing joint task force."

[3] *Id.* par. 30241: "A unified command is a joint force, under a single commander, which is composed of significant assigned or attached components of two or more Services, and which is constituted and so designated by the Joint Chiefs of Staff or by a commander of an existing unified command which was established by the Joint Chiefs of Staff."

Par. 30242*a* indicates that a unified command normally is required for the accomplishment of a ". . . . broad, continuing mission requiring execution by significant forces of two or more Services and necessitating single strategic direction."

[4] *Id.* par. 30201*a*(1): ". . . . The authority vested in an individual of the Armed Forces for the direction, coordination, and control of military forces."

[5] *Id.* par. 30246*c*. More specifically with reference to the handling of administration and discipline in joint operations of the Armed Forces, par. 30406 provides:

"*a. Primarily Uni-Service.* The administration and discipline of the Armed Forces is primarily a uni-Service matter. The commander of a unified command exercises only such control over the administration and discipline of the component elements of his command as is essential to the performance of his mission. Each component commander in a unified command is responsible for the internal administration of his command. The commander of a joint force, other than a unified command, is responsible for the administration and discipline of components of other Services only to the extent of furnishing such assistance as is requested by component commanders.

"*b. Single Commander.* When the command relationships place the responsibility for the administration and discipline of personnel of two or more Services on a single commander, the responsibility of this commander is limited to the following matters but is paramount therein:

(1) Military effectiveness of his command.
(2) Furtherance of his mission.
(3) Relationship of his command with the Armed Forces of other nationalities or with civilians.

hibits preoccupation with the details of such mundane matters as administration of military justice or personnel administration (and thus the tri-service ramifications of personnel law). The high-level unified command may have a legal office in its headquarters, but it will also have major subordinate uni-service commands with legal officers engaged in the "general practice" of military law who can provide most of the legal services required throughout the unified command, leaving the headquarters or joint staff legal office free to concentrate on the particular services required of it by the supreme commander (*e.g.,* in the field of international law).

On the other hand, it has been demonstrated that the unified command which is made up of comparatively small uni-service components topped by a truly integrated joint staff can be well serviced by a single legal office on the joint staff level engaged in the "general practice." Should more unified commands of this description be activated, whether to handle tactical or technical or other types of missions, it seems inevitable that they would create an increased number of billets for what might be termed "joint force lawyers."

In any event, whatever the future holds, it is believed that there are enough unique angles to the business of operating a joint force legal office to deserve examination.

First, however, a frame of reference will be fixed by describing with some exactness a joint force to be used as a model for discussion; *viz.,* a unified command of the type last mentioned above, but one which is completely fictional.

We will call this imaginary unified command the Air Forces Missile Command, abbreviated AFMC, supposedly organized pursuant to order of the Joint Chiefs of Staff, with the Chief of Staff of the Army designated as Executive Agent for the JCS in exercising control over AFMC.[7] AFMC was activated on the same day that an equally fictional civilian agency, the Ballistic Missile Commission (BMC), established by an imaginary act of Congress, became operational. BMC was established to develop to the production stage all the types of missiles needed by the Department of Defense for the defense of our country.

The mission of AFMC is threefold: (a) to inform BMC of DOD missile requirements and to contribute military know-how to the research and development of such missiles and assist in their test-

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%. ***Service Component Commanders.*** All matters of administration and discipline which do not affect the responsibilities of this commander as indicated above are handled by the Service component commander through their own Service chain of command.''

6 **10 U.S.C.** 141 (1952 ed., Supp. V).

7 See ***Joint Action Armed Forces, op. cit.*** *supra* note **1,** pars. **30221–30226,** for discussion of executive agents for the JCS.

ing; (b) to operate a school to provide training in various non-tactical aspects of military missiles; and (c) to operate depots for the storage of a DOD reserve stock of missiles and their maintenance and modification.

The Army, Navy, and Air Force participate in AFMC on about an equal basis, and the Marine Corps on a relatively minor scale. Commander, AFMC, is a two-star general or the equivalent flag officer, the command changing every two years and rotating through the Army, Navy, and Air Force. There are three deputy commanders, brigadier generals or equivalent, one each for the Army, Navy, and Air Force.

The AFMC joint staff is organized as shown in Figure 1. The staff members are drawn from all service components and are assigned generally on the basis of ability and without regard to the uniform worn.[8]

Two of the deputy commanders wear second hats as commanders of service components to which are assigned all members of their respective services in AFMC. For example, assuming that the Commander, AFMC, currently is a rear admiral, his Army deputy will be the Commanding General, United States Army Element, AFMC, and his Air Force deputy will be the commander, _____th USAF Special Reporting Wing. Commander, AFMC, will himself wear a second hat as Senior Naval Officer and exercise service-wise command over all Navy and Marine Corps personnel in AFMC. His Navy deputy will serve as his executive officer in service matters, and subordinate to them will be a captain (USN) in command of the AFMC Naval Administrative Unit. Each time the command of AFMC shifts to another service, one deputy commander will gain a command and another lose his (absorbed by new Commander, AFMC).

AFMC has nine satellite bases known as Site Alpha, Site Beta, Site Gamma, etc. Headquarters AFMC is a tenant on Site Alpha, which is located in a Midwestern state. The remaining sites are scattered throughout the United States.

As AFMC is organized on a functional basis, its sites are exempt from the control of commanders of any areas in which such sites happen to be located (*e.g.*, CG, Fifth U. S. Army). However, as is

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[8] *Id.* par. **30302:**

"*h.* The commander of a unified force shall have a joint staff. It shall be reasonably balanced as to numbers, experience, and rank of the members among the Services concerned, with due regard to the composition of the forces and the character of the operation(s) so as to insure an understanding by the commander of the tactics, techniques, capabilities, needs, and limitations of each component part.

"....

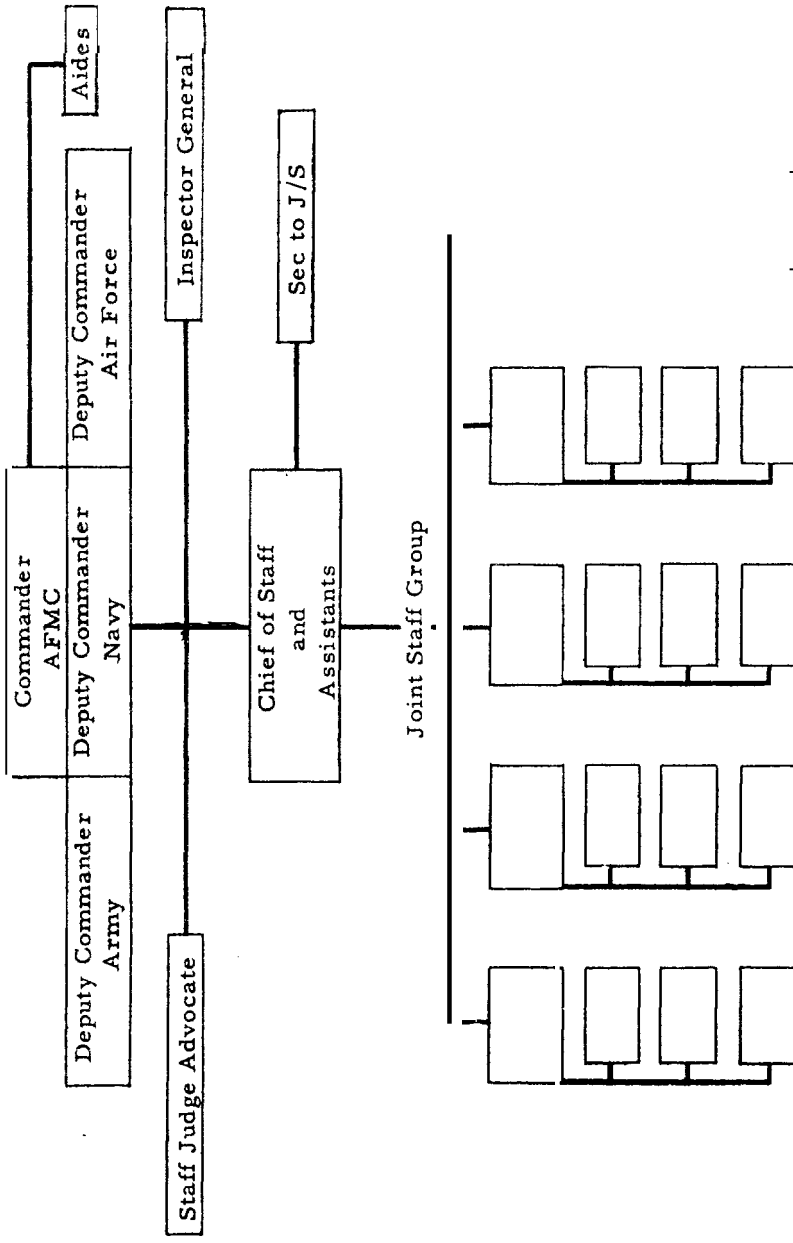

Figure 1. Organizational Chart, Headquarters, Armed Forces MissileCommand (an imaginary unified command).

characteristic of joint forces, AFMC relies heavily on area commanders, among others, for logistical and administrative support.

AFMC is governed by Army regulations, except as deviations are authorized by the Executive Agent. Each AFMC site is a Class 11 Army installation under the administrative jurisdiction of Commander, AFMC; all AFMC vehicles are procured from the Army; and the Army Engineer handles all site real estate transactions and all on-site construction projects of consequence.

Joint manning is not uniform throughout AFMC, some sites being manned entirely by Army or Air Force personnel, **or** by Navy with Marines serving as a security force. Each outlying site has about 1,000 military personnel assigned and 500 civilians employed. Site Alpha, including Headquarters AFMC, has about 6,000 military personnel, plus some 8,000 civilians employed by AFMC, by tenant nonmilitary Federal agencies working with AFMC, and by tenant prime contractors of AFMC and other Federal agencies.

Commander, AFMC, exercises reciprocal general court-martial jurisdiction; *viz.,* he may convene general courts-martial for the trial of members of any of the armed forces under his command.[9] He was empowered to do so by an order of the Secretary of Defense, as authorized by the President in an executive order.[10] Each deputy commander, in his role as a service component commander, also exercises general court-martial jurisdiction, but utilizes such power only in its collateral aspects (discussed later) and not to convene general courts-martial. Each site commander exercises special court-martial jurisdiction.

It is appropriate, at this juncture, to direct attention to the fact that the cited executive order uses the language "commander of *a* joint command or joint task force" as if the terms "joint command" and "unified command" were synonymous. However, the term "joint

"*l.* Personnel comprising a joint staff should be kept to the minimum number consistent with the task to be peiformed. In order for the staff to function smoothly and properly with due consideration for the policies of the commander, it is desirable that the personnel who comprise the joint staff be detailed therewith for sufficiently long periods of time to gain the required experience."

9 See note 18, *infra.*

10 Per Exec. Order No. **10428.** 17 Jan **1953.** 18 F.R. 408. which reads as follows:

"By virtue of the authority vested in me by the Uniform Code of Military Justice, Article **140 (64** Stat. **107,** 145), and as Commander in Chief of the armed forces of the United States, **I** hereby delegate to the Secretary of Defense the authority, vested in the President by the Uniform Code of Military Justice, Article **22** (a) (7), to empower any officer of the armed forces who is the commander of a joint command or joint task force to convene general courts-martial for the trial of members of any of the armed forces in accordance with the Uniform Code of Military Justice, Article 17 (a), and the Manual for Courts-Martial, United States, 1951, paragraph 13."

command" is not used in the doctrine-promulgating tri-service publication *Joint Action Armed Forces*[11] or in the tri-service *Dictionary of United States Military Terms for Joint Usage.*[12] The term "joint command" is not used in the Uniform Code of Military Justice; it is, however, used several times in the *Manual for Courts-Martial, United States, 1952,* apparently in the sense of "unified command."[13] The term will be so understood in this article, and no attempt will be made to discover the "legislative history" of its employment in the Manual.

I. ORGANIZATION OF THE UNIFIED COMMAND LEGAL OFFICE

A. *Functional Organization*

Organization of a legal office with separate branches to handle administration, military affairs, military justice, claims, and legal assistance, with more specialized branches (*e.g.,* procurement) if the workload warrants, is just as effective in a unified command as in any other. This appears valid regardless of the number or combination of services participating in the command.

See Figure 2 for organization of the Office of the Staff Judge Advocate, AFMC.

The satellite bases have no legal office organizational problems, being fortunate to maintain billets for one legal officer and one enlisted technician, the personnel situation being what it is today. The legal officer of each site manned by personnel of a single service is, naturally, of that service; *e.g.,* each Air Force manned site has an Air Force judge advocate assigned. There is one exception: Site Alpha, with Headquarters AFMC aboard, has no separate legal office; the SJA, AFMC, is the legal adviser of the Commanding Officer, Site Alpha, as an additional duty. This works out well as a practical matter and happens to coincide with Air Force policy[14] to have host and tenant units on a single base serviced by a single legal office.

Correspondingly, the service component commanders of AFMC, described earlier (*e.g.,* the CG, USA Elm, AFMC), do not maintain separate legal offices; the SJA, AFMC, acts as their SJA on an additional duty basis. He is also the legal adviser of the CO, NAU.

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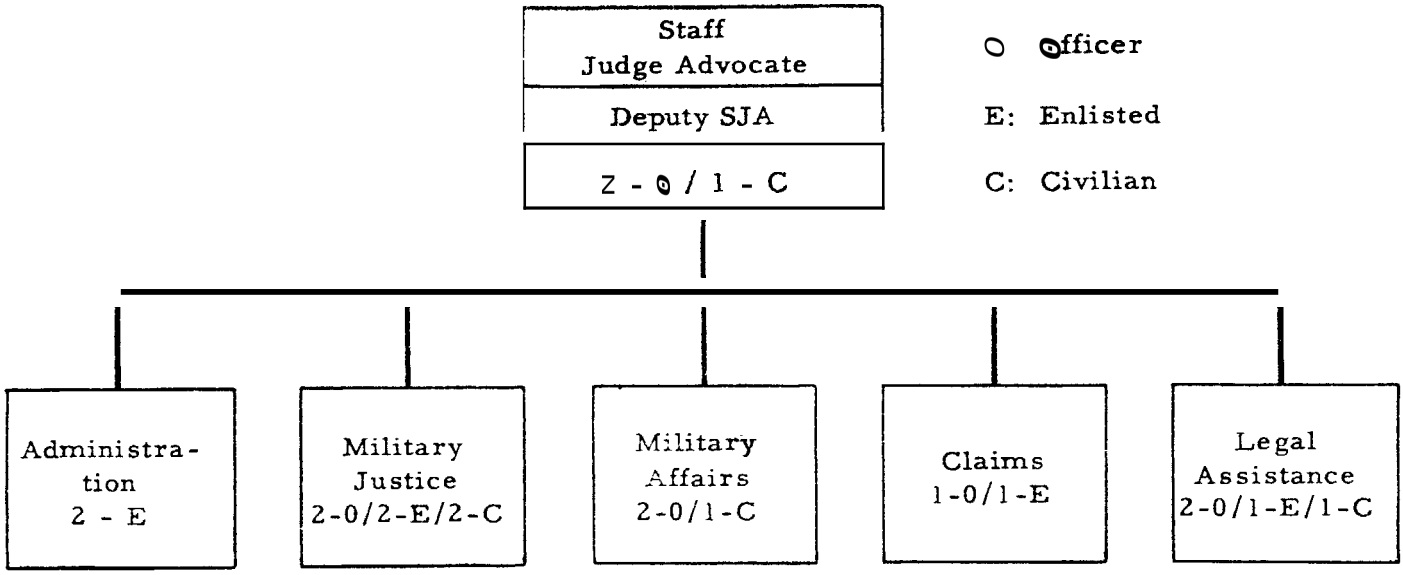
11 FM 110-5/JAAF/AFM 1-1, Sep 1951, as changed.

12 DA Pam. No. 320-1/OPNAVINST 3020.1B/AFP 5-1-1, 14 Mar 1958.

13 Notably in pars. 4g, 6a, and 13, MCM, 1951.

14 AFR 11-4.



ure 2. Organizational Chart, Office of the Staff Judge Advocate, Armed Forces Missile Command (an imaginary unified command).

B *Personnel*

The Office of the AFMC **SJA** is staffed with nine officers and six enlisted technicians, as follows :

Army --colonel, captain, first lieutenant, specialist second class, specialist third class.

Air Force —lieutenant colonel, captain, first lieutenant, master sergeant, airman third class.

Navy —lieutenant commander, lieutenant, lieutenant (j.g.), chief yeoman, yeoman first class.

There are five civilian employees in the office: two court reporters and three stenographers.

Why nine officers? Experience established that this number was needed to get the job done in **AFMC.** As few as six might be adequate in a comparable unified command, depending on the actual volume of legal work. However, six is suggested as the minimum in **a** command in which general court-martial jurisdiction is exercised over personnel at widely scattered sites, requiring considerable temporary duty away from the home office (as discussed later).

It is perhaps more significant that the three major services are represented in the **AFMC** SJA office in the same proportion as in the command as **a** whole. This balance is important as action items pertaining peculiarly to one service or another usually come into the office in numbers proportionate to the strength of the service in the command, and having a balanced legal staff tends to assure the presence of enough personnel with the right experience to cope with any problem.

The matter of experience deserves special comment. The typical officer assigned **as SJA** of a unified command such **as AFMC** will probably be **a** colonel or Navy captain and know his way around thoroughly in a command in his own service, where he possibly could get by indefinitely with an inexperienced staff. Not so in a unified command. Having little or no experience in handling legal problems of services other than his own, he must be supported by experienced officers and enlisted men of those other services in order to get his job done. He is going to need this kind of backing at the outset and as long **as** he is assigned to a unified command, for while he doubtless will become a multi-service **"jack-of-all-legal-trades"** within a few months, he will probably never be master of any but that of his own service.

How will unified commands such as **AFMC** fare in the matter of assignment of knowledgeable legal officers? Experience indicates

that they will do very well. The three Judge Advocates General have recognized that such assignments are out of the ordinary and should be filled with officers of wide experience and of sufficient flexibility to learn the ways of the sister services. Accordingly, the unified command can depend on procuring experienced legal officers down through the grade of captain (USA and USAF), or Navy lieutenant. Below this, the non-legal law of supply and demand gets pretty demanding and unified commands will receive their share of law school graduate officer appointees serving three years of obligated service. Not that this is so bad; the great majority of these young officers do excellent **work** after a few months on the job.

The SJA billet in AFMC calls for a a colonel or Navycaptain and the Deputy SJA space is marked for a lieutenant colonel or commander. These two billets are rotated through the Army, Navy and Air Force, changing every three years, and are always filled by officers of different services. This system has the virtue of qualifying officers of three services to hold such positions, but involves extra work for the personnel management people since every three years they must shuffle space allocations to accomplish the desired rotation. From the standpoint of rendering the required legal service, it would work just as well to assign the top two or three billets in the SJA office to different armed forces on a permanent basis. This is done in other staff offices of AFMC with optimum results.

Tours of all officers in AFMC are stablized at three years. Shorter tours are considered wasteful, as the average newly assigned officer spends a substantial part of his first year of duty in getting acquainted with the missile business. This tour stability is especially beneficial to the average legal officer, who must, in addition, learn how military law is practiced in services other than his own.

11. FUNCTIONS OF THE UNIFIED COMMAND LEGAL OFFICE

A. *Military Justice*

1. *Autonomy in Exercise* of *Court-Martial Jurisdiction*

When AFMC was first organized, no provision was made for the exercise of any court-martial jurisdiction by Commander, AFMC, in his role as such. Courts-martial wereconvened by service component commanders for the trial of members of their own service assigned or attached to AFMC. Supplementing these internally appointed courts, arrangements were made for certain non-AFMC uni-service commands, which were located near outlying AFMC

sites and furnished them support, to try general court-martial cases generated at such sites.

This system left Commander, AFMC, although responsible for discipline within his command, with no effective control over the administration of military justice therein, except for so much of it as involved his exercise of court-martial jurisdiction over members of his own service in his secondary role as a service component commander. Other disadvantages included a lack of uniform action on the part of the several convening authorities in referring similar cases to trial by general court-martial and in acting on sentences imposed, resulting in an erratic dispensation of justice in the command; a wasteful burden of work imposed on the AFMC legal office by the necessity of operating three internally appointed general courts-martial, maintaining three sets of general court-martial orders, etc.; and lack of any control over the processing time of general court-martial cases tried by non-AFMC courts.

Further, AFMC functions are in large part classified; now and then enforcement of security discipline results in a classified general court-martial trial; and it was felt the national interest required that such cases be tried not only "in the family" by an AFMC court, but by one composed of the best qualified members and trial personnel available in AFMC, regardless of service identity.

Another burdensome thing was that interchangeable utilization of AFMC legal personnel as counsel and law officers of the general courts-martial convened by the AFMC service component commanders was not authorized initially. In this connection, these convening authorities could not appoint as trial and defense counsel of their general courts AFMC legal officers of services other than their own, the Secretaries of the respective Departments not having authorized this practice.[15] Similarly, they could not utilize the authority of paragraph **4g (1)** of the Manual to appoint as law officer a qualified officer of another armed force serving under their command, having none so serving (all AFMC legal officers being assigned to headquarters units of their own service). The Secretaries of the Army, Navy, and Air Force later authorized interchangeable utilization of counsel and law officers. This helped; the real panacea, however, was a switch in policy to autonomy in the administration of military justice made possible by the grant of reciprocal general court-martial jurisdiction to AFMC already described.[16]

Upon being granted this jurisdiction, Commander, AFMC, advised his service component commanders that henceforth he would convene general courts-martial within the command, and to forward

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[15] As they later did pursuant to par. 4*g*(3), MCM, 1951.

[16] *See* note 10, *supra*.

to him the charges, reports of formal investigation, and all other allied papers in cases wherein they recommended trial by general court-martial. He also directed that they forward to him, for supervisory examination and review, all records of trial by inferior courts convened by them (special and summary courts-martial).[17]

Contemporaneously, Commander, AFMC, instructed his base commanders that they were responsible for discipline at their bases, regardless of whether a particular base might be jointly manned; that they would convene special courts-martial in their capacity as base commander and not as commander of any service component which they might head; and that all records of trial by inferior courts would be forwarded direct to Commander, AFMC, and not through service channels, for supervisory examination and review.

The commander of the Marine Barracks at each Navy-manned site was permitted to exercise special court-martial jurisdiction over the members of his command, but was required to utilize the services of the site legal officer and to forward all records of inferior court trial to Commander, AFMC, through the base commander, for the latter's information.

Commander, AFMC, also put an end to the practice of asking "outside" commanders to try general court-martial cases arising at certain outlying sites.

These steps gave Commander, AFMC, the control over the administration of military justice within his command which he needed.

2. *Reciprocal General Court-Martial Jurisdiction*

The order (fictional, remember) of the Secretary of Defense which gave Commander, AFMC, reciprocal general court-martial jurisdiction was in the same form which the Secretary has used on prior occasions.[18] This order did two things: (a) it empowered

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[17] Pursuant to Art. 65, UCMJ, and par. 94, MCM, 1951. This would include records of special court-martial trials involving a sentence to bad conduct discharge. But see discussion in paragraph 2A **17, *infra.***

[18] DOD Directive **5510.1,** dated **20** July 1963, apparently the first such order issued, reads as follows:

"By virtue of the authority delegated to me by the President in Executive Order 10428 of January 17, 1953, and pursuant to the Uniform Code of Military Justice, Article **22(a)(7),** I empower the Commanding Officer, Field Command, Armed Forces Special Weapons Project, to convene general courts-martial, and, further, pursuant to the Uniforix Code of Military Justice, Article 17(a), and the *Manual for Courts-Martial, **United** States, **1951,*** paragraph 13, I empower such officer to refer for trial by courts-martial the cases of members of any of the armed forces assigned or attached to or on duty with such command. In accordance with the *Manual for Courts-Martial, United States, 1951,* paragraph 5a **(2)** and appendix **4,** this Directive will be cited in orders appointing courts-martial under this authority."

Commander, AFMC, to convene general courts-martial, and (b) it further empowered him to refer for trial by court-martial the cases of members of any of the armed forces "assigned or attached to or on duty with" his command.

Had the order merely empowered Commander, AFMC, to convene general courts-martial, without more, it would have permitted him to exercise reciprocal court-martial jurisdiction only when the accused could not "be delivered to the armed force of which he is a member without manifest injury to the service."[19] At least it is so stated in the only definitive opinion on the subject, that written by Chief Judge Quinn in the *Hooper* case.[20] His reasoning was that Article 17(a) of the Uniform Code in substance gives every convening authority court-martial jurisdiction over all persons subject to the Code, provided their exercise of such jurisdiction over a member of another armed force is in accord with regulations prescribed by the President;[21] that the regulations so prescribed, in paragraph 13 of the Manual, set out the above-quoted "manifest injury" provision; and that it is a requirement for reciprocal jurisdiction that it be exercised only when the described "manifest injury to the service" would otherwise result.

A mere grant of power to convene general courts-martial would doubtless have been only a source of frustration to Commander, AFMC; he could hardly have established potential "manifest injury" in any case, having units of all the services right in his own command, with each service component commander exercising general court-martial jurisdiction, and thus he would have been little better off than before.

The second power granted by the Secretary of Defense order, however, boosted Commander, AFMC, into the desired orbit. By specifically empowering him, as a "joint commander," to refer to trial by court-martial the cases of members of any of the armed forces assigned or attached to or on duty with his command, the Secretary eliminated the "jurisdictional requirement" of establish-

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As of this writing three other such directives have been issued, involving the joint forces listed below:
DOD Dir. 5510.2, 20 Jul 1953--U.S. Northeast Command (inactivated)
DOD Dir. 5510.3, 20 Jul 1953--Iceland Defense Force
DOD Dir. 5510.4, 5 Sep 1956--U.S. Forces Azores

19 Far. 13, MCM, 1951.

20 U.S. v. Hooper, 5 USCMA 391, 18 CMR 15 (1955). *Cf.* ACM 8876, Markovitz, 16 CMR 709 (1954).

21 Art. 17(a), UCMJ, reads as follows: "Each armed force shall have court-martial jurisdiction over all persons subject to this [Code]. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President."

ing potential "manifest injury" and authorized his exercise of jurisdiction without regard thereto. This also is according to the opinion of Chief Judge Quinn in the ***Hooper*** case; Judges Brosman and Latimer did not subscribe to his views, but contented themselves with firing a few ranging shots at their brother, apparently because the point did not need to be settled in deciding the case. Under the presidential regulations as nom. written,[22] this "empowering" can only be done for convening authorities who are commanders of "joint commands or joint task forces"; in other words, all other convening authorities who undertake to refer to trial the cases of members of armed forces other than their own must satisfy the "manifest injury" jurisdictional prerequisite. Again, this is the view of Chief Judge Quinn in the *Hooper* case. The stability of this case as a precedent is subject to doubt, however, in view of the death of Judge Brosman and the lack of opinion in the premises by Judge Ferguson as yet.

Particular notice must also be taken of the fact that the Secretary of Defense in his order to Commander, AFMC, did not empower him to refer for trial by courts-martial the cases of members of any of the armed forces without regard to their unit assignment status, but only the cases of those members who were "assigned or attached to or on duty with" AFMC.

In the *Hooper* case, Chief Judge Quinn assumed, without deciding, that the Secretary of Defense acted within his authority in writing this limitation into the grant of power; his brother judges did not expressly disagree, and possibly, by concurring in the result of the case, impliedly agreed. One of the issues raised in the case was that the accused was not "assigned or attached to or on duty with" the command of the convening authority and therefore the latter had no jurisdiction to try him. The Chief Judge discussed this point in detail, expressing the view that the grant of power to refer such cases was not unbounded, but concluding that Hooper was in fact attached to a unit of the convening authority's command and was not "a vagrant person having no nexus with the joint command."[23]

This is **a** point for the SJA of a joint command to be wary about. Operating within his own service, the SJA is free to cause any accused of that service who happens to be in the custody of his convening authority to be hailed before a court-martial when appropriate. Thus, if a member of the convening authority's service, in desertion from a unit on the other side of the globe, casually stumbles into the clutches of the local gendarmerie and is turned

[22] **Par. 13,** MCM, 1951.

[23] U.S. v. Hooper. 5 USCMA **391. 401. 18**CMR **15, 25 (1955).**

over to the base provost marshal, he can be tried by a court-martial convened by such convening authority and never mind the "nexus." In a "joint command," however, the SJA should see that the deserter is attached to the command by appropriate administrative action before his case is referred for trial in the exercise of reciprocal jurisdiction in order to avoid the possibility of jurisdictional error. It is uncertain how the Court of Military Appeals would rule on such a point at the present time, over three years after the *Hooper* case was decided.

From the outset, the AFMC SJA office found that a reciprocal general court-martial jurisdiction was much easier to administer than the several uni-service jurisdictions which it supplanted. Much wasteful duplication of work in the office was eliminated and with only one authority convening general courts-martial and exercising supervisory authority over inferior courts it was relatively easy to achieve uniformity in the administration of military justice.

General court-martial trials of accused stationed at outlying AFMC sites, by courts appointed by Commander, AFMC, have presented no substantial problems. In some instances, to save manpower and money and when there is no likelihood that prejudice to the accused would result, trial of the accused is held at Site Alpha. Often the accused requests such a "change of venue," for reasons such as a fear that his alleged criminal conduct is so notorious at the relatively small base where he is stationed that a completely impartial court could not be mustered there. However, transfer of an accused to the situs of the headquarters of the unified command for trial will not work when, for example, the live testimony of an appreciable number of witnesses resident at or near the accused's station is required. Composition and appointment of general courts-martial convened to try cases at outlying AFMC sites is discussed briefly in paragraph 4, *infra*.

3. *Reciprocal Inferior Court-Martial Jurisdiction*

The grant of reciprocal general court-martial jurisdiction to Commander, AFMC, necessarily gave him authority to exercise reciprocal inferior court-martial jurisdiction, and also operated to vest in him the power to "authorize commanding officers of subordinate joint commands or joint task forces who are authorized to convene special and summary courts-martial to convene such courts for the trial of members of other armed forces under such regulations'' as he might prescribe.[24] (Presumably these commanding officers also may refer "reciprocal cases" to trial without regard to potential "manifest injury to the service.")

[24] Par. 13, MCM, 1961.

This authority has been exercised sparingly in AFMC. There have always been qualified officers of the different armed forces available to serve as summary courts-martial; consequently, there has been no need for exercise of reciprocal *summary* court-martial jurisdiction. There has, on the other hand, been limited exercise of reciprocal *special* court-martial jurisdiction. There are three AFMC sites jointly manned by personnel of different services; one of these is Site Alpha, jointly manned by Army and Air Force personnel. The commander of each of these bases has been authorized by Commander, AFMC, to convene special courts-martial for the trial of "members of other armed forces." The problems encountered by these site commanders in their exercise of this jurisdiction do not differ significantly from those discussed elsewhere in this article.

4. *Composition and Appointment of Courts-Martial*

The composition of courts-martial convened in the exercise of reciprocal jurisdiction is the subject of presidential regulations issued pursuant to Article 17(a) of the Uniform Code.[25]

As for members, the regulations state that they *should* be of the same armed force as the accused. It is further stated in substance that when it is *necessary* to convene a court of mixed membership (different armed forces represented), at least a majority thereof should be of the same armed force as the accused "unless exigent circumstances render it impracticable to obtain such members without manifest injury to the service."

The regulations mentioned thus far, appearing in paragraph 4g (1) of the Manual, have to do with "general policy." Under them, any convening authority may appoint as a member of a court-martial a person of an armed force other than that of the accused, provided it is *necessary*. He may do this without such a determination in each instance, and as a matter of routine, provided the cognizant departmental secretaries so authorize.[26] In the appointment of members of general and special courts-martial, however, he is subject to the further restriction that at least a majority of the members must be of the same armed force as the accused, unless he is faced with "exigent circumstances" which threaten "manifest injury."

The binding nature of these restrictive criteria has not yet been declared by the Court of Military Appeals. In the *Hooper* case, Chief Judge Quinn at one point,[27] in considering the wording of

[25] *Id.* pars. 4g (1) and (2).

[26] Par. 4g(3), MCM, 1951.

[27] 5 USCMA 400, 18 CMR 24.

both paragraph **13** and paragraph 4*g*, "assumed" that these regulations were mandatory in intent, despite their self-description as "policy" and use of the word "should" rather than a word of command; later in the opinion[28] he stated that he "need not decide" whether the language of paragraph 4*g* of the Manual is "mandatory or permissive." Judges Brosman and Latimer took the position that the presidential regulations as to reciprocal jurisdiction appearing in paragraph **13** of the Manual were no more than a "policy directive," and "not a condition precedent to prosecution but . . . merely a cautionary instruction for the guidance of the commanders." [29]

After these regulations declaring "general policy," subparagraph 4g **(2)** of the Manual deals with appointment of members of courts-martial from within a "joint command or joint task force." It is stated in substance that the commanding officer of such a joint force, who has been empowered (as was Commander, AFMC) to exercise reciprocal jurisdiction, may appoint as members **of** a court-martial persons of the *same* armed force **as** the accused in accordance with the general policy stated initially in subparagraph (1) of 4*g*. This does not appear to confer any considerable largesse upon the joint force commander, especially if he happens to be of the same armed force **as** the accused It is thereafter provided in **4g(2)** that whenever it is "necessary" in order to avoid manifest injury to the service, the joint force commander who has been duly "empowered" may appoint members of "other armed forces" to serve as members of his courts-martial "as an exception to the policy announced in 4*g* **(1)**."Nothing is said about a majorityof the members being of the same armed force as the accused, as in the regulations (4g(1)) applicable to the general run of convening authorities.

These regulations received another passing mention in the ***Hooper*** case by Chief Judge Quinn, who, after stating that he need not consider whether the language used in paragraph **4g** of the Manual is "mandatory or permissive" (as above noted), further stated :

> ". . . . Neither need I consider whether the requirements apply with the same force to a commander 'specifically empowered' to try accused who are members of other **armed forces."**[30]

By "requirements," reference was made to the criteria of "necessary" and "manifest injury" used in both paragraph 4*g* **(1)** and **4g (2)**. The reason why he did not need to consider the point was that

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[28] **Id. at 402, 18 CMR 26.**

[29] **Id. at 403, 405, 18 CMR 27, 29.**

[30] **Id. at 402, 18 CMR 26.**

all members of the court which tried Hooper were members of the same armed force (Navy) as the accused. Judges Brosman and Latimer did not comment on paragraph **4g.**

Where does this leave the **SJA** of a unified command? If his commander has been duly "empowered" to exercise reciprocal jurisdiction, the question will time and again arise as to the advisability of "mixed" membership of a general court-martial. The conservative thing to do is recommend appointment of members of the same armed force as the accused. The *Hooper* case certainly indicates that this is a good way to keep out of trouble.

Beyond this, the course is virtually unmarked on the chart of precedent. Certainly, the "empowered" joint force convening authority is authorized to appoint a member or members not of the same armed force **as** the accused to serve on his court-martial, when "necessary" to avoid "manifest injury to the service." But if he desires to appoint courts of "mixed" membership without regard to these conditions or to the policy that at least a majority of the members of the court be of the same armed force as the accused, it appears that this action can be justified only upon a theory such as that employed by Chief Judge Quinn in construing paragraph **13** of the Manual; namely, that a joint force commander's empowerment to exercise reciprocal jurisdiction exempts him from paragraph *4g's* restrictive provisions, whether they be considered mandatory or merely admonitory in nature. **A** good argument could be made for exemption from the "majority of the membership'' restriction, on the basis that it is not mentioned in paragraph *4g* **(2),** directly or by cross-reference to paragraph **4g (1).** The "necessary" and "manifest injury" criteria, however, are repeated in paragraph **4g (2)** in such an emphatic way as to give support to those who would contend that the mentioned criteria must be satisfied as jurisdictional "requirements."

Commander, AFMC, follows a conservative course and appoints court members who are of the same armed force as the accused, except when circumstances justify "mixed" membership under the criteria discussed. It has never been necessary in AFMC to convene a general court-martial on which fewer than a majority of the members were of the same armed force as the accused.

The preceding discussion is also applicable to the composition of special courts-martial convened in the exercise of reciprocal jurisdiction. Pertinent presidential regulations also appear in paragraph *4g* **(2)** of the Manual.

For the benefit of Army and Air Force readers who might not be familiar with the point, it is noted that the trial of a member of the

Navy or Marine Corps by a court composed of "mixed" members of the Navy and Marine Corps does not involve or require exercise of reciprocal jurisdiction, as the Navy and the Marine Corps are, under the Uniform Code of Military Justice, considered elements of one armed force.[31]

As for the appointment of law officers in the exercise of reciprocal jurisdiction, it is provided in paragraph 4g(1) of the Manual:

> ". . . . There is no policy restriction on the appointment of law officers from among qualified officers under the command of the convening authority irrespective of the armed force of which such law officers are members."

This confers such broad authority upon a joint force convening authority that there seems to be no need for the presidential remlations in the following paragraph (4g(2)) authorizing "empowered" joint force commanders to appoint as law officers of general courts-martial eligible persons under their command who are members of the *same* armed force as the accused. In AFMC, law officers are usually appointed on the basis of availability, without regard to armed force identity.

The same is true for appointment of trial and defense counsel, the presidential regulations on this subject giving joint force commanders equally broad latitude in selecting qualified counsel, irrespective of armed force identity.[32]

It has been noted that general courts-martial with mixed membership are appointed in AFMC only under exceptional circumstances; instead, three general courts-martial of uni-service membership are maintained. The forms of appointing orders used are, respectively, those prescribed by the regulations of the service represented by the membership of the court. Thus, after the convening authority has personally selected the court personnel, Army courts are appointed by court-martial appointing orders and Air Force courts by special orders, issued over his command line and signed by someone authorized to do so, such as the AFMC Chief of Staff or Adjutant General.[33] Navy court-martial appointing orders are issued in naval letter form from the convening authority to the president of the court or summary court officer, subscribed personally by the convening authority.[34]

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31. Art 1(2), UCMJ.

32 Par. 6*a*, MCM, 1951, provides in pertinent part: ". . . . The commanding officer of a joint command or a joint task force may appoint any qualified officer of his command as a counsel or as an assistant counsel of a general or special court-martial irrespective of the armed force of which such officer is a member."

33 AR 22–10, 19 Aug 1967, as changed; AFM 30–3.

34 1966 Nav. Supp. MCM, § 0103*a*.

Considering that the form of orders used is only a procedural matter, it doubtless would be legal enough for Commander, AFMC, or any other "empowered" joint force commander, to issue court-martial appointment orders in accordance with the regulations of one service; *e.g.*, by orders in naval letter form. However, this practice is not authorized by presidential regulations, in the Manual or out. As an expedient, the procedure described is not burdensome and it doubtless is of some comfort to those who eventually conduct the appellate review of the record of trial to find that the orders appointing the court are in a familiar form.

When a general court-martial case is to be tried at an outlying AFMC site, the base commander will submit to Commander, AFMC, a list of names of persons available for appointment as court members.[35] The SJA will work out the details of availability of counsel and law officer and see that the court is approved and orders duly issued by Commander, AFMC. There is nothing unique about this particular duty, except that reciprocal jurisdiction gives the SJA and his convening authority more latitude in selecting counsel and the law officer.

Occasionally, the site legal officer will be available for duty as trial counsel. It is **also** convenient on occasion to "borrow" a law officer from a non-AFMC command adjacent to the site where a trial is to be held. More often than not, as already **indicated,** the AFMC SJA office will furnish counsel and law officer on temporary duty. This usually is uneconomical due to the travel and per diem expense involved, but among other advantages has the virtue of enabling Commander, AFMC, to exercise a great deal of control over the processing time and thus to insure speedy dispensation of justice.

The AFMC SJA has three officers on his staff qualified to sit as law officers, but this occurred as an incident of assignment of experienced officers and not by design. There is nothing in the function of the unified command legal office which requires assignment of any particular number of officers qualified as law officers.

Appointment of courts-martial by those site commanders authorized to exercise reciprocal special court-martial jurisdiction is a relatively simple matter. The form of appointing order used is that prescribed by the appropriate service regulations. For example, Site Alpha is manned primarily by Army personnel, is commanded by an Army colonel, and uses Army-type administration. The CO, Site Alpha, appoints special courts-martial on Army-style orders, normally selecting his court members according to the service of

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[35] **As contemplated by par. 36c(1), MCM, 1951.**

the accused, but mixing them if necessary, and appointing counsel on the basis of availability (usually from the AFMC **SJA** office). A jointly-manned site run Navy-style would, on the other hand, have its court appointed by orders in naval letter form.

5. Reporters

The Manual, implementing Article 28 of the Uniform Code, provides the Secretaries of the several service Departments with authority to promulgate regulations further implementing the Manual provisions as to appointment of reporters for the recording of proceedings of and testimony taken before courts-martial.[36] Little has been published, however.

The Air Force has a regulation to the effect that a "convening authority will not direct that a reporter not be used in a special court-martial trial where the accused, if convicted, could receive a sentence including a bad conduct discharge." [37]

The Navy has provided by regulations that in each case before a general or special court-martial the convening authority *shall* appoint a reporter to record the proceedings of or the testimony taken before the court-martial, and that a reporter *may* be appointed by the convening authority of a summary court-martial.[38]

The pertinent Army regulations provide that reporters "shall not be appointed for summary courts-martial or for special courts-martial unless the convening authority shall have received special authorization in each instance from the Secretary of the Army." [39] As was intended when they were written, these regulations have, for all practical purposes, eliminated the jurisdiction of Army special courts-martial to impose a sentence to bad conduct discharge, due to the Uniform Code requirement (Art. 19) that this sentence cannot be adjudged by a special court-martial unless a verbatim record of trial has been made and the fact that an appointed reporter is needed to produce such a record.

The indicated differences in service regulations concerning employment of reporters present a problem to the commanding officer of **a** jointly-manned site who has been granted reciprocal *special* court-martial jurisdiction by Commander, AFMC. For example, may an Air Force or Navy site commander who has reciprocal special court-martial jurisdiction over Army personnel assigned to his command appoint a reporter to prepare a verbatim record of the trial of an Army accused by special court-martial?

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[36] **Par. 7, MCM, 1951.** See also pars. ***33k* and 49.**
[37] **Par. 2, AFR 111–8.**
[38] **1955 Nav. Supp. MCM,** § 0105*a*.
[39] **Par. 1, AR 22–145, 13 Feb 1957.**

The answer appears to lie in what regulations are governing. If the Air Force or Navy commander is governed by the regulations of his own service in the matter of employment of a reporter, then it would seem authorized for him to appoint a reporter to record verbatim the trial of an Army accused, notwithstanding the latter might thereby be exposed to a sentence to bad conduct discharge (assuming it was otherwise appropriate) without the sanction of the Secretary of the Army, as required by Army regulations.

However, the other side of this question could be argued on the theory that the Army has effectively limited the sentence jurisdiction of its special courts-martial by the mentioned regulations, that this is beneficial to accused members of the Army, and that an Army accused has a legal right to such benefit, regardless of the concept of reciprocal jurisdiction and the accident of his being assigned to a joint force.

There are no known precedents covering this situation. Confronted with it, Commander, AFMC, did the conservative thing and in connection with his grant of reciprocal special court-martial jurisdiction to site commanders, prescribed that a reporter would not be appointed to record the trial by special court-martial of any Army accused.[40]

This extracted each Air Force and Navy site commander exercising reciprocal jurisdiction from one dilemma, but coincidently immersed him in another: he could not dispense justice on an equal basis to all members of his command, without regard to service affiliation, to the extent that his special court-martial could not award a sentence of bad conduct discharge to an Army accused, although for an identical offense it could award such punishment to a non-Army accused.

Probably the best all-around solution to the dilemma would be publication in the Manual of presidential regulations authorizing convening authorities who exercise reciprocal court-martial jurisdiction to prescribe their own rules as to appointment of reporters for inferior court-martial trials.

A minor collateral problem can arise in connection with payment for the services of a contract reporter for a "reciprocal court-martial." Service regulations on payment of contract reporters differ somewhat, Navy regulations requiring the convening authority to "exhaust all local Governmental sources, including civilian employees," and then to clear with the Chief of Naval Personnel or

[40] As apparently authorized by par. 13, MCM, 1951. See also pars. 7 and 33k as to action by a convening authority to restrict the appointment of reporters.

the Commandant of the Marine Corps, as appropriate, before employing a contract reporter.[41] These variations make it desirable in a jurisdiction such as AFMC that a topside decision be made as to what service regulations are applicable, so that there is clear authority for payment of contract reporters.

6. *Delivery of Offenders to Civil Authorities*

Article 14(a) of the Code provides :

> "Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial."

The Manual implemented this Article only by referring to departmental regulations ;[42] these regulations have been duly "prescribed." [43]

The service regulations are quite similar, yet have differences which must be considered in a joint force, particularly if reciprocal jurisdiction is exercised therein. As an example, all services provide in their regulations that the requesting civil authority must sign a written agreement to return any member delivered, at no expense to the Government, but the Army regulations differ from the other two as to who is required to sign. Army requirements are satisfied if the agreement is signed by the official who takes delivery of the accused (*e.g.*, a deputy sheriff) ; the Air Force and Navy, however, in identical language require that the agreement be signed by the "Governor or other duly authorized officer of such State."

It is believed that the regulations of only one service as to delivery of personnel to civil authorities should be applied in a joint force, so that all members of the force will be treated equally in that regard (essentially same problem as discussed in proceding numbered paragraph).

Army regulations as to delivery of personnel to civil authorities are applied in AFMC, in accordance with the mission directive that the command be administered under Army regulations. This is a popular choice in the SJA office, as the Army regulations are considered easier to administer. The reason is that they authorize strictly local, as opposed to state, officials to sign the agreement to return a military offender to his unit ; in many cases, the Air Force

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41 1956 Nav. Supp. MCM, § 0105*c*(3)(c). See also AR 37–106, 9 May 1958, as changed, and AFBI 173–30, which are less stringent.

42 Par. 23*c*, MCM, 1951.

43 AR 600–320, 17 May 1931, as changed; AFR 111-11; 1955 Nav. Supp. MCM, §§ 0701-0705.

and Navy requirement for the signature of a *state* officer is needlessly burdensome and insistence upon compliance therewith generates bad public relations. The agreement is of doubtful validity anyway, as evidenced by repeated instances over the past few years of refusal by FBI agents, district attorneys, and others similarly circumstanced to sign the agreement on the grounds that they lacked authority to sign it or that the law of their sovereign made no provision for incurring the expense of returning the accused contemplated by the agreement.

7. *Preliminary Investigation of Reported Offenses*

In the Army and Air Force, the investigation of reported offenses, preliminary to the preferring of charges, ranges from informal inquiry into the facts by the commanding officer or other person in authority concerned, to a comprehensive investigation by an Army Military Police Criminal Investigation (MPCI) detachment or the Air Force's Office of Special Investigations **(OSI).**

The procedure is generally the same in the Navy, although the apparatus used is somewhat different. For example, serious or complicated allegations may be inquired into through the medium **of** a "formal investigation'' or "court of inquiry," as provided in Chapter III of the Naval Supplement. The alleged offender is always made "a party" [44] to investigations or inquiries falling in this category.

In AFMC, preliminary investigations are conducted in accordance with the regulations of the armed force of the accused. This poses no problems, as virtually all members of AFMC are assigned to a uni-service unit for administration, and it is routine to process the investigations within these units.

8. *Preferring Charges*

Charges are preferred by all services in substantially the same manner, in accordance with the provisions of the Manual,

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44 **1955** Nav. Supp. MCM, § 0304*d*, provides:

"A party to an inquiry or investigation shall have the following rights:

(1) To be given due notice of such designation.

(2) To be present during the proceedings, but not when the court or investigation is cleared for deliberations.

(3) To be represented by counsel.

(4) To challenge members of a court of inquiry but only for cause stated to the court (Art. 135*d*, UCMJ; Sec. 0302*c* (3) NS MCM).

(5) To cross-examine witnesses.

(6) To introduce evidence.

(7) To testify as a witness.

(8) To make a voluntary statement, oral or written, to be included in the record of proceedings or investigative report.

(9) To make an argument at the conclusion of presentation of evidence."

The only variance of importance is in the different policies of the services as to preferring charges when such would lead to a so-called "second trial"; *i.e.,* trial of a service member by court-martial for a particular offense after he has been convicted of that same offense in a non-Federal civilian court such as a city police, state district, or foreign court. Such a trial by court-martial is not, of course, barred by the former jeopardy provision of the Code,[45] although this is a common lay misconception.

The Navy has a policy prohibiting "second trials" without first obtaining, in each case, the permission of the Secretary of the Navy.[46] Army policy (newly announced) is that a member subject to the Code will not *normally* be tried by court-martial or be awarded non-judicial punishment for the same act or acts over which a civil court has exercised jurisdiction, but that officers exercising general courts-martial jurisdiction may, upon recommendations of the officer exercising summary court-martial jurisdiction, authorize court-martial trial or non-judicial punishment ". . . . notwithstanding the previous trial, upon a personal determination that authorized administrative action alone is inadequate and that punitive action is essential to maintain discipline in the command . . . ." [47] Air Force policy resembles that of the Army, but is not restrictive as to the convening authority who may authorize a "second trial." [48]

AFMC command policy is that members convicted in civilian courts will not normally be tried by court-martial for the same offense, but that exceptions may be authorized by Commander, AFMC, in aggravated cases when the best interests of the service dictate court-martial trial.

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45 Art. **44,** UCMJ; par. 68*d,* MCM, **1951.**

46 SECNAV Instruction **5813.1.** See Op JAGN 1953/197, **12** Nov **1953, 3** Dig Ops, Mil Pers. § **15.31,** for examples of situations in which such permission might be granted.

47 Par. **3,** AR 22–12, 24 Apr **1958.**

48 See ACM **S–11780,** Peck, 20 CMR 810, 811 (1955), in which the following is set out as Air Force policy :

"In those cases where military personnel have been convicted and punished in local, state, county, or municipal courts, further trial by court-martial or punishment under Article **15** for the same offense is usually not justified. Previous trial in civilian courts, except United States Courts, is not a legal bar to trial by court-martial or punishment under Article **15;** however, further punishment by the military authorities normally should be confined only to those cases where offenses other than those for which civilian punishment was imposed have been committed, usually **of a** military nature, or where the sentence imposed by the civilian court is grossly inadequate. Instances in which punishment by court-martial or under Article **15** is justified in addition to the punishment imposed by civilian courts are rare."

See also par. 12*b,* AFR **125–14,** for a similar policy concerning prosecution of traffic violations.

9. *Article 32 Investigation*

The formal investigation of charges required by Article 32 of the Code presents the unified command legal officewith no particular problems, as all the services conduct these investigations in accordance with pertinent provisions of the Manual. However, it has been noticed in the **AFMC** SJA office that the Navy makes greater use than do the other services of Article 32(c), which provides that if the requirements of Article 32(b) have been met in a prior investigation, no further investigation is necessary. This is occasioned by the Navy's use of "formal investigations" and ''courts of inquiry,'' as mentioned earlier, by which the requirements of Article **32**(b) are satisfied.

10. *Advice and Referral*

The rigid requirement[49] that the SJA present an "advice" (*i.e.*, a recommendation as to whether **a** case should be referred to GCM trial, and why) to his convening authority and obtain the latter's personal decision as to reference of the charges concerned to trial permits of no service variation of substance. There are, however, minor differences among the services in practice as to the form of the SJA's advice (often called "pretrial review" in the Navy).

The Army-style advice quite commonly is brief, containing little, if any, more than is required by the Manual.[50] The Navy practice is much the same, although it has been suggested in an authoritative article[51] that the staff legal officer's pretrial review "may and should include any additional information relating to the offense or the accused and command policy considerations which might tend to assist the convening authority in making his decision'' whether to direct trial, and any "anticipated difficulties **as** to legal **procedures** or problems which might arise during the trial."[52]

By policy directive, the Air Force requires, in addition to the minimum requirements of the Manual, "a thorough analysis of the facts together with the applicable principles of law and the basic factors which warrant reference to trial by general court-martial," and "appropriate comment as to the nature and seriousness of the offense, the maximum punishment prescribed and the accused's character and military background insofar as it relates to his restorable potential."[53]

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49 Art. 34(a), UCMJ; U.S. v. Greenwalt, 6 USCMA 568, **20** CMR 285 (1955).

50 Par. 35*c*, MCM, 1951. It is noted, however, that the model advice **suggested** by The Judge Advocate General's School, U. S. Army, is not **a** brief, minimum document.

51 Cdr. Carlton F. Alm, USN, *The Staff Legal Officer*, The JAG Journal, Aug 1956.p. 3.

52 *Id.* at **5.**

53 USAF Military Justice Cir. No. 8, § 309(1).

The AFMC SJA uses an advice form which, in uncomplicated cases involving an Army or Navy accused, normally includes only the matter required by the Manual, plus a short informative statement of the facts of the case. In advices involving Air Force accused, additional information and comments sufficient to meet the requirements of the Air Force policy directive are included.

11. *Agreed Pleas*

The agreed plea system was, of course, initiated by Major General Franklin P. Shaw's letter of 23 April 1953, at which time he was Acting The Judge Advocate General of the Army. The system has been used ever since by the Army, in general court-martial cases only, with excellent results.

The Navy adopted the system as to general court-martial cases in September 1957[54] and in December 1957 extended coverage to pleas in special court-martial cases.[55]

The Air Force has not subscribed to the agreed plea system.

By "agreed plea system" is meant the procedure under which the offer of an accused to plead guilty for a consideration may be accepted by a convening authority. What evolves is an "agreed plea" or "pretrial agreement as to guilty plea" or "negotiated plea." The agreement itself, and utilization thereof, are subject to other requirements imposed, respectively, by the Army[56] and the Navy[57] and which are outside the scope of this discussion.

The Air Force's abstention from use of the agreed plea system makes it necessary for the SJA of a unified command to obtain a decision as to whether his convening authority will, nevertheless, use the system in cases involving Air Force accused (assuming that he subscribes to the Army and Navy programs).

In AFMC the solution has been to use the agreed plea system in the general court-martial field without regard to service identity of the accused. The criteria followed are an inclusive combination of those set out in the applicable Army and Navy directives (there being substantial identity between them), The fact that a guilty plea was the subject of a pretrial agreement is then reflected in the record of trial according to requirements of the directives of the accused's service. For example, in the Navy a copy of the pretrial agreement

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54. SECNAV Instruction 5811.1, Subj: Pretrial Agreement as to Guilty Pleas in General Courts-Martial, 11 Sep 1957.

55 SECNAV Instruction 5811.2, Subj: Pretrial Agreements as to Guilty Pleas in Special Courts-Martial, 17 Dec 1957.

56 TWX DA 525595, 9 May 1957, from TJAG to CG's all Armies and USCONARC.

57 See notes 54 and 55, *supra.*

is to be "made an enclosure to the review of the staff legal officer." The Army requires that the existence of the agreement be mentioned in the SJA's review ; that the law officer hold a reported out-of-court hearing and inquire into the circumstances surrounding the agreement (in order to be satisfied that the accused's plea and agreement were providently made) ; and that a copy of the pretrial agreement and a record of the out-of-court hearing be made appellate exhibits to the record of trial.

There being no comparable Air Force requirement to be met, the fact that the guilty plea of an Air Force accused in an AFMC general court-martial case was the subject of a pretrial agreement is not reported in his record of trial.

In the special court-martial field in AFMC, pretrial agreements as to guilty pleas may be consummated only with Navy accused. This is another makeshift arrangement?based upon the circumstance that as of this writing the Navy is the only service which has sanctioned use of the agreed plea system in special court-martial cases.

12. *Trial Procedure*

Court-martial trial procedure is substantially the same throughout the Armed Forces; with the exception of tri-service procedural differences in the trial of guilty plea cases and a minor difference in presentencing procedure in Navy cases.

Air Force policy requires "that the prosecution introduce all available evidence bearing on offenses charged regardless of a plea of guilty notwithstanding **a** request by the defense that the prosecution present no evidence in view of the guilty plea."[58] This policy has been interpreted in many Air Force jurisdictions as requiring only that a *prima facie* case be put in by the trial counsel, In addition, the Air Force goes by the book in requiring that instructions be given as to elements of offenses, presumption of innocence, reasonable doubt as to guilt and degree of guilt, and burden of proof with respect to any offense to which **a** plea of guilty relates.[59]

The Army, on the other hand, requires in guilty plea cases only that "where there are aggravating or extenuating circumstances, the pertinent facts should be placed before the court, by stipulation or otherwise, in order that the appropriateness of the sentence adjudged may be based upon fact rather than conjecture."[60] No instructions

58 USAF Military Justice Cir. No. 8, § **402**(5).

59 *Ibid.* This is in accordance with Art. 51(c), UCMJ, and par. *73,* MCM, 1961. Nevertheless, Air Force boards of review have "affirmed" in guilty plea cases in which no instructions were **given.** *E.g.,* ACM 13088, Menery, Dec 1956, not reported.

60 JAGJ 1954/4420, 19 Apr 1954, **54** Chron 115; repeated in JAGJ 1957/1014, 5 Feb 1957. 57 Chron Ltr 5/9.

are required by the Army following a providently entered guilty plea, other than an informative instruction as to the meaning and effect of the plea, and that it does not relieve the court of making findings in closed session.[61]

It is interesting to note that the Air Force specifically cautions its personnel against following the described Army practice as to instructions in guilty plea cases.[62]

The Navy does not require the trial counsel to present any evidence before findings in guilty plea cases and customarily none is presented. Notwithstanding this, the Navy stands fast with the Air Force in requiring that the mentioned minimum instructions be given the court in guilty plea cases.[63]

One other procedural variation of the Army is the requirement, discussed in paragraph 11, *supra*, that in general court-martial cases involving a guilty plea entered pursuant to a pretrial agreement an out-of-court hearing must be held as to the agreement, and both a copy of the agreement and a record of the out-of-court hearing must be attached to the record of trial as appellate exhibits.

The Army procedures above described are followed in AFMC general court-martial cases, the convening authority having concluded that a uniform procedure for trying guilty plea cases should be followed in the command and that the Army's procedure was the most realistic. It is noted that while the "no-instructions" procedure of the Army violates applicable provisions of the Code and the Manual and Air Force and Navy practice, it does not constitute reversible error, the Court of Military Appeals having held in a familiar early case that a failure in a guilty plea case to give the minimum instructions mentioned, although legal error, is not prejudicial error requiring reversal.[64]

The mentioned Navy presentencing procedure which differs from that of the other services has to do with introduction of evidence of previous convictions and personal data pertaining to the accused. An occasional Navy practice is for the trial counsel or an assistant trial counsel, as custodian of the accused's records *pro tempore,* to take the stand after findings and give sworn testimony as to any previous convictions. Other relevant data from the accused's service

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61 Changes 13 and 40, approved by TJAG, DA, and distributed on 19 April 1956 for inclusion in revised DA Pam. No. 27-9, *Military Justice Handbook—The Law Officer.*

62 USAF Military Justice Cir. No. 8, § 402(5).

63 See note *59, supra.* No Navy directive on this point has been found. Navy boards of review have "affirmed" in guilty plea cases in which no instructions were given. *E.g.,* NCM 66 03433, Neese, 11 Dec 1956, not reported.

64 U.S. v. Lucas, 1 USCMA 19, 1 CMR 19 (1951).

record may be presented in this manner for either the prosecution or defense. This procedure is followed in AFMC court-martial trials when the trial counsel is a member of the Navy and desires to utilize it; otherwise, following more conventional practice, the accused's personnel officer or other person normally having custody of his records is called as a witness when necessary to introduction of the desired evidence.

13. *Punishment*

Paragraph **126e** of the Manual, as amended,[65] insofar as it pertains to reduction of enlisted persons, has been implemented in three different ways by the services, and thus it must inevitably receive the special attention of the SJA of a unified command.

The Army permits the "automatic reduction" formula of paragraph **126e** to work its alchemy and effect the reduction of the accused, by the book.

The Navy, wanting no part of it, has issued regulations stating that "automatic reduction to the lowest enlisted pay grade under paragraph 126*e*, MCM, 1951, will not be effected in the naval service."[66] Under the Navy's approach, if a court-martial wants an enlisted accused reduced in grade as a punishment, it must specifically sentence him to reduction. It is published Navy policy that "enlisted persons of other than the lowest enlisted pay grade who are sentenced to confinement exceeding three months or to dishonorable or bad-conduct discharge also be sentenced to reduction to the lowest enlisted pay grade,"[67] but in the present judicial climate there appears to be no legal and error-free way to get this across to a court-martial in a particular case after it has been referred to the court for trial.[68]

The Air Force flies a middle course, permitting the "automatic reduction" to the lowest enlisted grade to **work** in the ordinary case,

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[65] By **Exec.** Order No. 10652, 10 Jan 1956, effective **20** Jan 1956, **21** F.R. **235,** the second sentence of paragraph 126*e* of the Manual was amended to read in pertinent part **as** follows:

"Unless otherwise prescribed in regulations promulgated by the Secretary of the Department concerned, in the case of an enlisted person of other than the lowest pay grade, a court-martial sentence which, ai approved by the convening authority, includes: (1) dishonorable or bad-conduct discharge, whether or not suspended, (2) confinement, or (3) hard labor without confinement, immediately, upon being so approved, shall reduce such enlisted person to the lowest enlisted pay grade . . . ."

[66] 1955 Nav. Supp, MCM, § 0109

[67] *Ibid.*

[68] U.S. v. Choate (No. 11,026), 3 Oct 1958; U.S. v. Estrada, 7 USCMA 635, *23* CMR 99 (1957), and cases cited therein; U S. v. Holmes, 7 USCMA 642, **43** CMR 106 (1957).

but providing that convening and supervisory authorities may by certain prescribed action retain the airman accused in his present grade or effect a reduction only to an intermediate grade.[69]

In AFMC, the presidential and departmental regulations are applied severally, according to the service identity of the accused. This fits in with the sense of the Congress (as discussed in the *Hooper* case) that reciprocal jurisdiction should be exercised sparingly and that accused service members should, insofar as reasonably possible, be tried by courts-martial convened within their own service. However, when it is considered that Commander, AFMC, exercises general court-martial jurisdiction as the commander of a "joint command" and not as a service component commander, that he exercises reciprocal jurisdiction in this "neutral" capacity and may refer the case of any member of any armed force to trial provided he is under his command, that he may appoint counsel and the law officer without regard to their service identity and that there is some question as to whether he operates under any restrictions as to appointment of courts with "mixed" membership, it becomes doubtful whether service identity of the accused is necessarily the proper criterion for determining which of the mentioned service systems for dealing with "automatic reduction" should be applied in the accused's case. It is believed that this situation, among others discussed, points to a need for expanded presidential regulations as to exercise of reciprocal jurisdiction.

14. *Post-Trial Review and Action on Sentence*

Exercise of reciprocal jurisdiction in a unified command has no important effect on how the SJA of the command conducts his post-trial review of a record of trial. In AFMC a comprehensive form of review is utilized in all cases. It includes the matter which the Manual requires in paragraph 85*h*, a detailed clemency section containing information bearing on the accused's potentiality for rehabilitation, and certain items desired by the services, such as comment as to existence or nonexistence of a pretrial agreement for a guilty plea (Army), and attachment of a copy of any such pretrial agreement (Navy). Both the manner of conducting a post-trial review and preparing the written report thereof are revised as need be to accord with opinions of the Court of Military Appeals.[70] It

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[69] AFR 111-15, 18 Mar 1957.

[70] *E.g.*, U.S. v. Vara, 8 USCMA 651, 25 CMR 155 (1958); U.S. v. Palacios, 8 USCMA 613, 25 CMR 117 (1958); U.S. v. Katzenberger, 8 USCMA 497, 24 CMR 307 (1957); U.S. v. Powell, 8 USCMA 373, 24 CMR 183 (1967); U.S. v. Jenkins, 8 USCMA 274, 24 CMR 84 (1957); U.S. v. Johnson, 8 USCMA 173, 23 CMR 397 (1957); U.S. v. Grice, 8 USCMA 166, 23 CMR 390 (1957); U.S. v. Plummer, 7 UPCMA 830, 23 CMR 94 (1957).

seems probable that the continued interest of the Court will "unify" the form of the SJA post-trial review and eliminate any appreciable service variations therein.

The forms employed by the convening authority in taking action on a sentence are prescribed in the Manual and apply equally to authorities exercising single-service and reciprocal jurisdiction. However, there are some different service practices affecting preparation of "actions" which are of concern to the **SJA** of a unified command.

For example, suspension of so much of a sentence as pertains to execution of a sentence to punitive discharge until the accused's release from confinement or until completion of appellate review, whichever is the later date, by action of the convening authority signifies (here we go again) something different to each service. In the Army, this is routine and convening authorities are urged so to suspend "unless it positively appears that the accused is definitely unfit for restoration."[71] The Air Force, on the other hand, directs that suspension be used only for purposes of clemency.[72] The Navy practice is to utilize this type of suspension about as routinely as the Army, but for still a different purpose.[73]

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71 Ltr (AGAM-P(m) 210.8 (20 Aug 1956) JAGJ), DA, Subj: Suspension of Punitive Discharges, 28 Aug 1956. This letter superseded DA Msg. 443496, 6 Aug 1956, which explained the reason for this policy as follows: "In the vast majority of cases the prisoner's suitability for further service may properly be determined only after extensive study of the individual and evaluation of his progress in the rehabilitation program of the military confinement installation."

72 USAF Military Justice Cir. No. 8, § 504(1), which reads in pertinent part: ". . . . The sole purpose of suspending the execution **of** a punitive discharge is to give the accused the opportunity to redeem himself and earn restoration in the military service."

73 In *Vacation* of *Suspension*, by Lieut. Cdr. Alvin C. Johnston, USN, The JAG Journal, Oct **1952,** p. 14, it is stated that the normal purpose of a suspension under par. 88*e*, MCM, "is to grant the accused a period of probation within which he may demonstrate by his conduct that he deserves to have the suspended portion of the sentence remitted," and that "an action by the convening authority in suspending execution of a punitive discharge until the accused's release from confinement or until completion of appellate review, whichever is the later date, is not a true suspension in the probationary sense; it is, rather, a method by which the other parts of the sentence may be ordered executed by the convening authority pending completion of final review as prescribed by the Code." See also SECNAV Instruction 5810.6B, 19 Mar 1957, par. 3*b*, which indicated that a punitive discharge which is the subject of such a suspension is regarded as an "unsuspended punitive discharge." At the risk of further belaboring the semantics involved, it is observed that the Navy seems to regard the type of suspension under discussion as more of a deferment of execution of sentence to discharge for administrative convenience than a probationary measure evolving from clemency considerations.

Each service also has its own rules as to designation of confinement facilities. It will be mentioned only that Army and Air Force prisoners sentenced to punitive discharges and to confinement and initially considered nonrestorable may be sent to a U. S. Disciplinary Barracks if they will have at least six months of confinement to serve upon arrival at that facility;[74] certain Air Force prisoners considered potentially restorable may be sent to Air Force Retraining Groups provided they have at least 90 days of their sentence to confinement left to serve upon arrival at the facility (less good conduct time);[75] and Navy prisoners sentenced to confinement shall be sent to a Naval Retraining Command if they have at least two months' confinement left to serve upon arrival there (exclusive of good conduct time).[76]

The convening authority exercising reciprocal jurisdiction has no choice but to apply these service directives concerning sentence suspension and designation of place of confinement, as they concern administration of prisoners after they leave his command and come under the jurisdiction of the service departments. Thus, in AFMC, actions are prepared in accordance with the directives of the service of the accused concerned.

15. *Preparation of Orders; Records of Trial*

All the services use the forms of promulgating and supplementary court-martial orders set out in the Manual without substantial change. In the Navy, such orders must be signed personally by the convening authority unless he has specifically authorized one of his staff to sign for him "by direction."[77] Army and Air Force court-martial orders are issued over the command line of the convening authority and signed by a staff officer such as the Adjutant General, in the Same manner as court-martial appointing orders (Army), or special orders (Air Force).[78]

Preparation of records of trial likewise is uniform, as all services assemble records in accordance with instructions contained in the Manual and utilize Department of Defense record of trial forms.

Accordingly, these matters require no special handling in a unified command, other than conformance to service-prescribed methods of signing court-martial orders, if desired.

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74 Par. 4, AR 633–5, 24 Sep 57, as changed; AFM 125–2, p. 67.
75 AFM 125–2, p. 68.
76 BuPers Instruction 1640.5, 18 Dec 1957.
77 1955 Nav. Supp. MCM, § 0118.
78 AR 22–10, 19 Aug 1957, as changed; AFM 30–3.

16. *Appellate Review*

The Congress made it very clear in the Code that reciprocal jurisdiction was not to extend to appellate review of a record of trial; *i.e.,* any review subsequent to that by the officer with authority to convene a general court-martial.[79] Accordingly, the AFMC SJA forwards each record of trial requiring departmental review to the Judge Advocate General of the armed force of the accused concerned.[80]

17. *Supervisory Examination and Review of Inferior Court-Martial* ***Records of Trial***

The only significant difference in service practices in conducting supervisory examination and review of records of inferior court trials occurs in the handling of those records mentioned in Article **65** (c) of the Code; *i.e.,* summary court-martial records and those special court-martial records which do *not* involve a bad conduct discharge. These types of records do not receive departmental review; the Code requires, as here pertinent, only that these records be reviewed by a judge advocate of the Air Force or Army, or a law specialist of the Navy.[81]

It is the practice in the Air Force and the **Army for** the judge advocate, upon reviewing a record of inferior court trial, if **he** finds that no corrective action by the supervisory authority is required, to note on the record that a review was accomplished, the result of the review, the date, designation of command, and his signature.[82] The signature of the convening authority is not **required.**

The Navy practice, on the other hand, is for the supervisory authority, after the required review by a law specialist has been accomplished, to "place his action on the record"; the action shall include the statement "This record has been reviewed in accordance with Article **65**(c), UCMJ."[83] The supervisory authority must sign this action personally. It is noted, however, that the convening authority may authorize his chief of staff to "exercise supervisory powers over summary courts-martial and special courts-martial not involving a bad conduct discharge."[84]

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[79] Art. 17(b), UCMJ, provides: "In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command which held the trial, where that review is required under this [Code], shall be carried out by the department that includes that armed force of which the accused is a member."

[80] Pars. 13, 99, MCM, 1951.

[81] Art. 65(c), **UCMJ.**

[82] Par. 2, AR 22–145, 13 Feb 1957; par. 5, AFR 111–8.

[83] 1955 Nav. Supp. MCM, § 0117*d*.

[84] *Id.* § 0117*a*.

The Navy also provides by regulations that when an officer exercising general court-martial jurisdiction is the convening authority of a summary court-martial or special court-martial not involving a bad conduct discharge, his action thereon will be as convening authority only; and he will forward the record of trial to an appropriate superior officer who exercises general court-martial jurisdiction for the accomplishment of the required supervisory review.[85] In the Air Force and Army the custom has been for a commander exercising general court-martial jurisdiction to act also in the capacity of supervisory authority over inferior courts-martial convened by him. The Court of Military Appeals has not yet proscribed this Army-Air Force practice, although the case of Airman McGary, decided 9 May 1958, seems to be a step in that direction.[86]

Commander, AFMC, follows the practice of the service concerned in acting as supervisory authority on records of trial.

It is worth recording that at one time the Navy took the view that the powers conferred upon a "joint commander" such as Commander, AFMC, to convene general courts-martial, and to refer for trial by court-martial the cases of members of any of the armed forces assigned or attached to or on duty with the command, did not include the power to act as supervisory authority and review records of trial by inferior courts-martial of members of other armed forces within the command when the inferior courts-martial were convened by a commander whose authority was derived from a source other than the "joint commander." [87] Applying this view in our imaginary unified command situation, Commander, AFMC, would lack authority to perform the supervisory review contemplated by Article 65(c) of a record of trial by a summary court-martial convened by the commanding officer of a Marine barracks at one of the AFMC Navy-manned sites, as such commanding officer derived his authority to convene the court-martial directly from the Code and in no sense from Commander, AFMC (no exercise of reciprocal summary court-martial jurisdiction being authorized in AFMC).

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85 *Id.* § 0117c.

86 U.S. v. McGary, 9 USCMA 244, 26 CMR 24 (1958).

87 NCM 287, Reese, 14 CMR 499 (1954). In speaking of authority to convene courts-martial "derived from a source other than the joint commander," the board ostensibly implied that the commander of a joint command empowered to exercise reciprocal general court-martial jurisdiction could be a source of primary authority to convene inferior courts-martial. This, of course, is fallacious; doubtless the board had in mind the authority of the commander of a joint, command, who has been empowered to exercise reciprocal general court-martial jurisdiction, to in turn "empower" certain of his subordinate commanders (already authorized to convene inferior courts-martial) to exercise reciprocal inferior court-martial jurisdiction, pursuant to the provisions of paragraph 13 of the Manual.

This position was effectively overruled by a board of review decision in the case of a Marine by the name of Byrne, on the basis of reasoning which took note of the fact that the "joint commander" involved had a law specialist of the Navy on his staff (and thus, presumably, that the review of a record of summary court-martial which was in issue in that case had been accomplished for the "joint commander" involved by a law specialist in conformance with Article 65(c) of the Code).[88] Unfortunately, the *Byrne* case has not been reported, while the report of the prior case remains on the books.

18. *Non-Judicial Punishment*

Army and Air Force procedures for imposition of non-judicial punishment under Article 15 of the Code are substantially identical and are characterized by simplicity.

The award of punishment may be based upon only a brief informal investigation to which the individual concerned is not made a party. Only commanding officers may impose the punishment. By departmental regulations members of the Air Force and Army may elect trial in lieu of non-judicial punishment.[89]

In the Navy, trial by court-martial may not be demanded.[90] In addition to commanding officers, officers-in-charge may award non-judicial punishment. The award normally is based on facts developed by an investigation to which the individual concerned is a party; if the individual was not made a party, the report of investigation will either be returned for further proceedings to accomplish this or the individual will be afforded a hearing in accordance with paragraph 133b of the Manual by the commanding officer or an officer acting for him.[91]

There are other differences between the Article 15 procedures of the Navy and those of the Army and the Air Force, and the SJA of a unified command must learn both systems of taking action. The reason—and this involves a potentially troublesome problem for the SJA—is that the commander of a "joint command," as such, lacks authority to impose non-judicial punishment upon a member of his command and must rely upon his subordinate service component commanders to take such action.

This is not based on a theory that reciprocal jurisdiction involves only courts-martial and does not extend to non-judicial punishment, as was stated in a 1953 Navy opinion.[92] Even without resorting to

88 3–54–S–95, Byrne, 29 Jan 1954, not reported.
89 Par. 132, MCM, 1951.
90 *Ibid.*
91 1955 Nav. Supp. MCM, § 0101.
92 Op JAGN 1953/140, 19 Feb 1953, 3 Dig Ops, Non-Jud Pun § 3.1.

Article 17 and any powers derived therefrom, Article 15(a) and its implementation in paragraph 128*a* of the Manual appear to provide basic authority for a "joint commander" (who, after all, is a "commanding officer") to impose non-judicial punishment. It would seem highly illogical that he could not, while at the same time he could be empowered to convene courts-martial and exercise reciprocal jurisdiction.

In any event, the matter has been resolved on a policy basis. In the previously cited publication ***Joint Action Armed Forces,*** promulgated jointly by the Secretaries of the Army, Navy and Air Force, a general restriction is imposed against the imposition of non-judicial punishment by a commander of one service upon a member of another.[93] This is consistent with other statements in this publication, noted earlier, that discipline of the Armed Forces is primarily a uni-service matter and that each component commander in a unified command is responsible for the internal administration of his command, but does not seem sufficiently flexible to accommodate a continuing situation under which it is essential to the performance of his mission that the commander of a unified command exercise "discipline of the component elements of his command."[94]

Whether this restriction was intended as a tri-departmental regulation issued pursuant to Article 15(b), limiting the "categories of commanding officers" authorized to impose non-judicial punishment, is not clear, but it has had the same effect. Citing the foregoing as authority, the three Judge Advocates General have joined in holding that a "joint commander" may not take action under Article 15.[95]

Once again, this policy seems inconsistent with the broad principle laid down in ***Joint Action Armed Forces*** that the commander of a unified command is responsible for discipline in his command.[96]

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[93] ***Joint Action Armed Forces,*** op. *cit. supra* note 1, par. 30413*b*, provides: "As a matter of policy, nonjudicial punishment, under the provisions of the UCMJ, Article 15, should not be imposed by a commander of one Service upon a member of another Service."

[94] See note 5, *supra.*

[95] TWX from Hq USAF to COMFLDCOM, AFSWP, Sandia Base, Albuquerque, N.M., AFCJA 30335, 24 Dec 1953, which reads in pertinent part: "Aside from questions involving legality of any such action under Article 16, nonjudicial punishment should not be imposed by the commander of one armed force on personnel of another armed force even though such commander is empowered to exercise reciprocal court-martial jurisdiction pursuant to MCM, 1951, paragraph 13. In that connection, the policy expressed in paragraph 30413*b*, FM 110-5/JAAF/AFM 1-1 is deemed applicable and controlling. The Judge Advocate General of the Army and Navy concur." See also JAGJ 1952/2903, 26 May 1952, quoted in par. 128*a*, Army 1956 Pocket Part, MCM, 1951, to the same general effect.

[96] See note 5, *supra.*

As it stands, Commander, AFMC, and other "joint commanders" similarly circumstanced find themselves in the anomalous position of being responsible for command discipline and able to refer the case of any member of the command to trial by general, special or summary court-martial, but unable to take the established lesser degree of punitive action provided in Article 15.

On the general court-martial level in AFMC, the Commander's inability to take action under Article 15 is a possible source of friction with his deputies. For example, in a case in which Commander, AFMC, desired that one of his officers be awarded non-judicial punishment and so informed the cognizant deputy commander, it would not exactly strengthen the essential rapport between the two should the deputy, being sincerely in disagreement, refuse to award the punishment.

The dilemma of **a** site commander in AFMC who has members of more than one armed force directly under his command is different, but possibly even more acute. He may not impose non-judicial punishment upon members of his command who are not of his service, so in their case must forswear that tool of discipline or request a superior commander of his service to take Article **16** action for him ;neither solution is satisfactory,

Need for a change is indicated, on the obvious grounds that a commander should not be given responsibility for discipline while one of the basic tools for maintaining it is withheld from him. Possibly more would be required to empower a "joint commander" to award non-judicial punishment than merely to withdraw the policy against such and then to rely on the present wording of the Manual. If so, it is submitted that the necessary reform clearly could be accomplished by amending paragraph 128*a* of the Manual to provide specifically that the commander of a "joint command or joint task force" empowered to exercise reciprocal court-martial jurisdiction is a "commanding officer" authorized to take action under Article 15. In this regard, Article 15(a) grants authority to award non-judicial punishment to "any commanding officer'' without limitation as to service identity of the subject of the award or his commanding officer, or the two vis-a-vis each other.

B. *Claims*

The processing of claims is essentially a uni-service matter. Each service component commander in a unified command, being responsible for the internal administration of his command generally, is responsible for claims administration therein, subject to such over-

riding exercise of control by the commander of the unified command as is essential to the performance of the latter's mission.[97]

In AFMC, consistent with the foregoing, all personnel claims are processed in accordance with the regulations of the service of the claimant.[98] Thus, the office of the AFMC SJA, located at Site Alpha, at which are stationed members of the Army, Navy (including Marines), and Air Force, processes personnel claims under all three sets of service regulations.

All other claims arising in AFMC are processed under Army regulations in accordance with the general policy as to administration of AFMC. This is related to the circumstances noted at the outset, that all vehicles used in AFMC are "Army vehicles,'' all AFMC sites are Class II Army installations, and all real property utilized by AFMC is "Army real estate.'' It is commonplace, therefore, for an Air Force judge advocate or Navy law specialist, serving as a site legal officer, to process claims for and against the Government, including claims under the Federal Tort Claims Act, and other claims such as those under Article 139 of the Code, in accordance with Army regulations.99 This presents no problem. An Air Force judge advocate has handled all claims at Site Alpha for several years with fine results.

Forwarding of claims is, of course, also governed by service regulations; it is not required that claims processed at the outlying sites be forwarded through Headquarters AFMC. In the case of claims other than the personnel variety, if it is concluded on up the line that an AFMC claims matter should not be handled by the Army, this is disposed of on the departmental level.

C. *Legal Assistance*

Members of the Armed Forces seem particularly "unified" in the types of personal legal problems which they have. Thus, there is no need to devise a legal assistance program tailored to the special requirements of a unified command.

At Site Alpha in AFMC, legal assistance is provided to all entitled thereto under the programs outlined in all three service regulations.[100] This creates no complications, as all the programs are substantially similar. A legal assistance officer (service identity im-

97 *Joint Action Armed Forces, op. cit. supra* note 1, par. 30106.

98 AR 25–100, 12 Sep 1956, as changed; AFR 112–7; 1953 Nav. Supp. MCM, 1951, App. 11.

99 AR 26–20, 7 Mar 1956, as changed; AR 25–25, 26 Apr 1957; AR 25–30, 20 Feb 1957; AR 25–80, 29 May 1951; AR 25–105, 20 Jun 1968.

100 AR 600–103, 29 Jun 1951, as changed; AFR 110–4; SECNAV Instruction 5801.1.

material) is appointed by a general order of Headquarters AFMC, citing the three service regulations as authority. The legal assistance program at each outlying site is conducted in accordance with the service regulations under which the site is administered.

The only "unified command aspect" of the operation is that, in the periodic reporting to Washington of numbers of legal assistance cases disposed of in the command, and related data, the report form prescribed by Army regulations is utilized. Identical copies are sent to the Judge Advocates General of the three services, with no breakdown of cases by service. This has been accepted; there has been no demand that a separate report be submitted according to service connection of the client.

D. *Military Affairs*

The military affairs branch of the average military legal office could just as logically be called a "miscellaneous branch," for it handles all legal problems not within the purview of the other established branches of the office, whether they fall into recognized fields of law or must be categorized as "odd-ball." Consequently, the work is highly varied.

In a unified command the work is much the same as it is elsewhere in the service, except that the variety is intensified by the previously demonstrated proclivity of the services for doing the same thing equally well in different ways, Some of the diverse legal matters handled in the military affairs branch of the AFMC SJA office will be mentioned briefly.

Procurement. The relatively small amount of direct procurement by AFMC is accomplished under Army Procurement Procedure (APP). This includes the handling of such taxation problem as arise. Policies laid down by the APP as to dealing with labor problems are also followed in AFMC.

Litigation; Patents; Lands. All litigation and related problems arising in AFMC, such as the propriety of releasing official information which might form the basis of a claim against the Government, are processed under Army regulations. Patent law problems and legal matters concerning government lands under AFMC jurisdiction are also processed in accordance with applicable Army regulations and other directives, with direct assistance as required from the cognizant divisions of the Office of The Judge Advocate General, U. S. Army.

Personnel Law Problem. This category includes all manner of questions of law pertaining to the status, rights and obligations of military (and certain civilian) personnel, from enlistment, induc-

tion or appointment to separation in one form or another, including retirement. These matters must be handled in accordance with the regulations of the service of the individual concerned, for authority to take needed personnel actions (*e.g.*, discharge, reduction) is derived from laws and regulations which either pertain solely to the individual's service, or to two or more services, and not at all to a "joint commander," as such.

It is in this field (primarily personnel administration, rather than law) that the deputy commanders of AFMC, in their role as service component commanders, make indirect use of their power to convene general courts-martial. This is due to the fact that service regulations commonly authorize commanders so empowered to take certain personnel actions, such as the administrative discharge of enlisted men under certain conditions, review of line of duty determinations, and approval of board findings as to pecuniary liability of an individual for the loss of money or property.

The use of whatever service regulations are applicable in these personnel matters is, of course, a necessary deviation from the general policy as to administration of AFMC under Army regulations. A corollary difference is that service command channels are used for forwarding personnel matters for action, rather than AFMC command channels (as in forwarding court-martial matters), since Commander, AFMC, cannot act thereon.

Proceedings to accomplish the administrative discharge of enlisted men are a staple action item in the AFMC Military Affairs Branch. Only Army and Air Force proceedings are reviewed; the local Naval Administrative Unit processes its own, with an occasional request for legal opinion pertinent thereto. The criteria are generally the same (unfitness, unsuitability, inaptitude, homosexuality, etc.), so in such matters equality of treatment is not a matter of concern to a unified command. A substantial part of the proceedings include board action, particularly those involving Army respondents. The Air Force eliminates many board actions and saves much money and manpower by providing in AFR 39–16 and 39–17 for the discharge for unsuitability or unfitness of those airmen who apply for it, waiving their right to board action; this procedure lightens the work load of the AFMC Military Affairs Branch.

Army and Air Force reports of survey and reports of board proceedings, assessing pecuniary liability against enlisted military personnel for loss of funds, or loss of or damage to property, have no counterpart in the Navy. This is of continuing concern to Commander, AFMC, because it leads to unequal treatment of personnel under his command and to that extent impairs morale. For example,

the Site Alpha motor pool is staffed with Army, Navy and Air Force drivers. A Navy driver who negligently damages a government sedan may not be required *administratively* to pay the cost of repairing the vehicle, whereas his fellow-drivers in the Army and Air Force who cause damage to a vehicle under identical circumstances may be and often are required to pay, involuntary checkage of their pay being authorized by law.[101]

It has been noticed in the AFMC SJA office that, apparently due to lack of authority to require Navy personnel to reimburse the Government under the circumstances indicated, Navy commanding officers are prone to make greater use of Article 108 of the Code and charge drivers and others who negligently lose or damage government property with commission of a criminal offense under that Article. This practice doubtless has a deterrent effect: in a joint command, however, it only compounds the disparity of treatment noted.

Inter-Service and Inter-Agency Agreements. Due to the nature and scope of AFMC activities, the command receives support from many Federal agencies, military and otherwise, and works closely with many governmental and civilian agencies in operational matters. It is essential to orderly functioning that these activities be the subject of agreements or memoranda of understanding outlining the nature and degree of the support or activity concerned, delineating the responsibilities of parties thereto, etc. All these documents are reviewed by the AFMC SJA, if only to ascertain that they contain no legal implications. This type of legal business on any large scale is somewhat out of the ordinary, but can be anticipated as being fairly routine in a unified command resembling AFMC.

E. *Administration*

The administrative branch of the AFMC SJA office operates a message center, maintains files, sets of regulations, and the office law library, prepares reports, and otherwise functions in a familiar pattern. The multi-service manning of the command, however, does make it necessary to maintain more than the normal quantum of regulations, it being necessary to have available those of all three services, as well as those of the Marine Corps. An augmented law library is also maintained, due to the desirability of having readily at hand the statute and case law applicable in all jurisdictions in which AFMC sites are located.

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101 **Army: 10** U.S.C. 4837(b) (1952 ed., Supp. V); Air Force: 10 U.S.C. 9837(b) **11052** ed., Supp. V). The Navy has no similar !ax.

Joint manning of the command also increases the numbers of reports which must be submitted by the AFMC SJA office. It has already been noted that only one legal assistance report is prepared, identical copies being furnished the respective Judge Advocates General. It is otherwise as to the reporting of court-martial cases; periodic reports are made to each service, as required in service directives, of the number and kind of court-martial cases involving members of that service tried during the period. This gears AFMC into world-wide court-martial statistic reporting and contributes to accuracy in calculating world-wide court-martial rates.

One final observation as to administration concerns preparation of correspondence. Administration of AFMC under Army regulations resulted in adoption of Army correspondence forms for general use. This posed no problem for Air Force personnel, since their own are substantially the same. However, the processing of personnel law matters pertaining to Navy personnel, through Navy channels, necessarily involves use of naval correspondence forms which are quite different. This is where the Navy complement in the AFMC SJA office really comes into its own; many an Army and Air Force judge advocate has been humbled by his first attempt to draft a letter in acceptable naval form.

III. MISCELLANEOUS OBSERVATIONS

Internal management of a unified command legal office requires no technique essentially different from that employed in management of any uni-service legal office, apart from whole-hearted observance of the obviously beneficial staff policy of forgetting about service distinctions and working together as a team of lawyers.

One of the greatest aids to the SJA of such a command is the maintenance of a detailed policy book. Having a policy book in a service legal office is, of course, pretty routine. However, it has been demonstrated in the foregoing discussion that there are often three right and legal ways to take a certain action in the field of military law, one for each of the services. When this factor is applied to the considerable number of types of action items which come into a busy service legal office with reasonable frequency, it comes out that the SJA of a unified command is expected to have a larger number of answers on tap than his colleague in a uni-service command. Thus, he has up to three times more justification for keeping a policy book, not only as a crutch for his own memory as to how recurring problems should be handled, in accordance with applicable law, regulations, and the commander's policies, but for use by others when he is absent or after he has been detached.

A possibly related matter is that it seems particularly helpful in a unified command to issue detailed command directives covering such matters as administration of military justice, claims, and legal assistance. These directives, tailored to the nature and characteristics of the command, promote better administration by specifying exactly how certain things will be done, eliminating doubt as to possible applicability of varying uni-service procedures. This is particular reassuring to those who feel at sea when not operating by the book of their own service.

The work pattern of the AFMC SJA is influenced by the fact that he has quite a cluster of stars just over his head. This refers, of course, to the deputy commanders. The commander and his deputies work closely together as a team, and whenever a legal matter arises which touches upon the competence of a deputy, the commander will invariably seek the views of that deputy before taking action. As a result, it is standing operating procedure for the SJA to touch base with the cognizant deputy before presenting any matter to the commander for decision. This would appear to be sound practice for any unified command SJA to follow, subject to the wishes of the commander.

A related potential problem of the AFMC SJA is an incident of his serving as the legal adviser of the deputies (in their role as commanders), the CO, Site Alpha, and the CO, NAU, AFMC, as well as Commander, AFMC. For example, it is quite common for the SJA to be called upon by the Commanding Officer, Site Alpha, for legal advice concerning a matter which must later be considered by Commander, AFMC, who will, in turn, also ask the advice of the SJA. If the CO, Site Alpha, adopts a course of action opposed by the SJA, the latter gets a "second crack" at the matter when he subsequently advises Commander, AFMC, and may well cause the decision of the CO, Site Alpha, to be reversed. A similar situation involving one or more of the deputies and the Commander, with the SJA "smack dab in the middle," can also arise quite readily. If not played with finesse by the SJA, such a role can easily result in losing a friend and antagonizing a boss. Inevitably, however, the unified command structure tends to require the SJA to wear a number of hats and thus to play the role described more often than he would in a uni-service command.

One tactic which has proved helpful is for the SJA to be completely frank with his senior clients as to the counsel he proposes to furnish each, pointing out that duty often requires him to advise both proponents and opponents of a particular course of action.

A mild problem for the SJA of a unified command arises from the fact that the Army has had a mandatory military justice train-

ing program for all ranks in effect since 1951, while the Navy and the Air Force have no counterpart. In AFMC this is handled by requiring all Army personnel who have not previously had such training to attend a school held annually. Selected Air Force and Navy personnel, designated by their service commander, also attend the school. In addition, special courses designed to prepare selected personnel of the command for duty as members and counsel of courts-martial are given as required.

IV. CONCLUSIONS

The unified command, in drawing together members of two or more services under one roof in a common endeaver, focuses attention on both the similarities and the differences of the services. In the foregoing paragraphs, much has been said of their variant practices in the field of military law, but these are insignificant in proportion to those practices which are similar. The fact is that the legal field appears to furnish fertile soil in which to plant the seeds of unification, for a unified command legal office shows itself to be a "natural" joint activity in the way service lawyers integrate to form a smoothly-functioning, productive team. As new unified commands and joint task forces are formed, there need be no misgivings as to the feasibility of establishing a jointly-manned legal office on the joint staff level or of empowering a "joint commander" to exercise reciprocal jurisdiction. It works.

However, it would work better with a few changes in regulations, as discussed hereinafter.

(1) First of all, the term "joint command" used in the Manual apparently is not a term approved for joint usage of the Armed Forces and does not with certainty describe any established military formation. It is suggested that upon a revision of the Manual the term "unified command" be substituted for "joint command" wherever the latter term is used, it being evident, as pointed out in the beginning of this article, that the term "joint command" is used in the Manual in that sense.

(2) The presidential regulations as to reciprocal jurisdiction set out in paragraph 13 of the Manual should be rewritten to make it perfectly clear that the commander of a "joint command or joint task force" empowered to "convene courts-martial for the trial of members of another armed force" may, in the exercise of this power, refer the case of any member of the Armed Forces to trial without first determining in each case that "the accused cannot be delivered to the armed force of which he is a member without

manifest injury to the service." Sufficient justification for this lies, of course, in the ***Hooper*** case, in which the point was litigated at the cost of much time and treasure without being settled.

It is not known what was intended when paragraph **13** was written, but experience has proved that it would impose an intolerable handicap on a "joint commander" such as Commander, AFMC, to require him to make a determination as to "manifest injury" before referring each general court-martial case to trial. It would force a division of responsibility for discipline and the administration of military justice, as each case in which potential "manifest injury" was not proved would have to be passed to a subordinate service component commander for trial. These commanders would have to maintain active general court-martial jurisdictions, and the command SJA would thus be burdened with supervising the administration of several such jurisdictions rather than one, with all the added problems that this would entail. Lastly, every time the "joint commander." found potential "manifest injury" and retained jurisdiction, the defense would be presented with a built-in assignment of error,

Commanders empowered to exercise reciprocal inferior court-martial jurisdiction would be plagued with similar problems if required to findpoten tial "manifest injury" in each case before referring it to trial.

(3) The presidential regulations in paragraph 4*g*(2) of the Manual should also be clarified in one respect. As now written, it is uncertain whether an empowered "joint commander,'' in appointing members of "other armed forces'' to serve on a court-martial, is at all subject to the restrictions in paragraph **4g(1)** which requires that at least a majority of the members be of the same armed force **as** the accused in the absence of "exigent circumstances."

(4) It would also be worthwhile to augment the presidential regulations concerning reciprocal jurisdiction with specific provisions as to appointment of reporters and as to "automatic reduction."

A statement in the Manual giving an "empowered'' joint force commander discretion to prescribe his own rules as to appointment of reporters would, for example. solve the dilemma posed for such commanders by the Army regulations restricting appointment of reporters for inferior courts-martial.

The dilemma of the joint force commander as to application of the several service regulations concerning "automatic reduction,'' with their unequal effects, while at the same time trying to dispense equal justice regardless of service identity, is not so easily solved. The best solution would be adoption of uniform regulations by the services. Since such concord is unlikely to occur at any time prior to the millenium, the best alternative would seem to be a new Manual provision that the regulations of the accused's service as to "automatic reduction" will be applied by "reciprocal courts." This would at least provide **a** clear guideline for joint force Commanders concerned.

(5) Addition to paragraph **94** of the Manual of a sentence specifically giving all joint force commanders who exercise reciprocal general court-martial jurisdiction supervisory powers over all special and summary courts-martial convened in their commands is suggested in order to remove any doubt **as** to their authority to perform this function, which is so essential to the proper discharge of their responsibility for internal discipline and administration of military justice.

(6) In order to give joint force commanders who exercise reciprocal jurisdiction unquestionable authority to impose non-judicial punishment on any member **of** the Armed Forces under their command, it is suggested that paragraph 128*a* of the Manual be amended to provide that any joint force commander empowered to exercise reciprocal jurisdiction is a "commanding officer" authorized to take action under Article 15.

(7) Lastly, promulgation of uniform service regulations as to delivery of military offenders to civil authorities, and as to court-martial trial of military personnel **for** offenses of which they have been convicted in civil court, would ease the problems of joint force commanders with respect to these matters.

More uniformity in certain other service regulations could alleviate some of the less pressing problems of joint force commanders discussed throughout this article, but pursuit of such for the benefit of *so* few does not seem justified at this time. Even without any of the changes in regulations suggested, operation **of** a joint force legal office will continue to be completely feasible, and ***a*** duty assignment therein a stimulating and rewarding **experience.**[102]

102 ***Nota bene.*** The prototype for the imaginary Armed Forces Missile Command (AFMC) is, of course, Field Command, Armed Forces Special Weapons Project, located at Sandia Base, Albuquerque, New Mexico, and operated under the command of the Chief, Armed Forces Special Weapons Project, Washington, D. C. An imaginary unified command was used as a model for discussion, in lieu of Field Command, primarily because any detailed description of the organization and functions of the latter would require security classification.

The legal office of Field Command is the only one of its kind in the United States and is believed to be the only unified command legal office in the world in which Army and Air Force judge advocates and Navy law specialists, as well as enlisted legal technicians of those services, work together as a fully integrated legal staff, handling a wide variety of legal problems.

Not all the legal problems discussed have been, or even can be, encountered in Field Command. For example, Commander, Field Command, has never empowered any subordinate commander, pursuant to paragraph 13 of the Manual, to exercise reciprocal inferior court-martial jurisdiction.

SUBMISSION OF POST-TRIAL REVIEW TO ACCUSED PRIOR TO CONVENING AUTHORITY'S ACTION

BY COLONEL **JASPER** L. SEARLES *

Recently, the Court of Military Appeals has shown considerable concern for the right of an accused to become familiar with the contents of the post-trial review prior to the action of the convening authority. Thus, in *United States* v. *Griffin,*[1] the Court, discussing the propriety of a staff legal officer'sreferring, in the course of the review, to "other facts concerning the accused's absence'' which "facts" were to be found in the record of trial of another accused, stated :

> "Unquestionably, it was error for the convening authority to consider, in his deliberations on the sentence, adverse matter from outside the record without affording the accused an opportunity to rebut or explain that matter.'' [2]

Previously, the Court had indicated its concern with the standard employed by reviewers in determining the sufficiency of evidence as manifested by language appearing in the review. Thus, where such language suggested that the convening authority was bound by the findings of the court-martial [3] or that an appellate standard had been employed by the staff legal advisor,[4] a new review, demonstrating employment of a correct standard,[5] would be required. In *United States* v. *Fields,*[6] the Court, noting the large number of recent cases dealing with the contents of the review, set forth the minimum requirements for the written review of every trial by general court-martial resulting in a conviction.

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1 8 USCMA 206, 24 CMR 16 (1957).

2 Id. at 207, 24 CMR 17.

3 U.S. v. Grice, 8 USCMA 166, 23 CMR 390 (1957); **U.S.** v. Johnson, 8 USCMA 173, 23 CMR 397 (1957).

4 U.S. v. Jenkins, 8 USCMA 274, 24 CMR 84 (1957).

5 Art. 64, UCMJ, 10 U.S.C. 864 (1952 ed., Supp. V); par. 87*a*(3), MCM, 1951.

6 9 USCMA 70, 25 CMR 332 (1958).

1. A summary of the evidence.
2. An opinion as to the adequacy and weight of the evidence.
3. An opinion relative to the effect of any error or irregularity.
4. A specific recommendation as to the action to be taken,
5. Reasons for both the opinions and the recommendation.

The Court noted that "these requirements follow generally the areas of the convening authority's powers over findings and sentence as established by Article 64 of the *Code* . . . ."[7] Of course, where the accused has either judicially confessed or pleaded guilty, some of these requirements do not have to be met.[8]

It cannot be overemphasized that the staff judge advocate's review "must do more than summarize; it must also advise."[9] Thus, where a review in a contested case fails to advise the convening authority as to the reviewer's opinion as to the sufficiency of the evidence, it is fatally defective.[10] In a word, the review must contain a reasoned evaluation. Both the legal and factual sufficiency of the evidence must be appraised.[11] A staff judge advocate cannot stop with the generality that "the competent evidence is sufficient in law" or "legally sufficient,"[12] but he must make a factual evaluation of the proof against the backdrop of the "reasonable doubt" standard; also he should inform the convening authority of the latter's duty to determine the credibility of witnesses and resolve controverted questions of fact and that he must be satisfied beyond a reasonable doubt of accused's guilt.[13] Countless reviews have been stricken down on this last point.

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7 *Id.* at 74, 25 CMR 336.

8 See U.S. v. Fields, *supra* note 6; also, U.S. v. Duffy, 3 USCMA 20, 11 CMR 20 (1953).

9 U.S. v. Flemings, 8 USCMA 729, 25 CMR 233 (1958).

10 *Ibid.*; U.S. v. Withrow, 8 L SCMA 728, 25 CMR 232 (1958).

11 U.S. v. Acker, 9 USCMA 80, 25 CMR 342 (1958); U.S. v. Howes, 9 USCMA 78, 25 CMR 340 (1958); U.S. v. Westrich, 9 USCMA 82, 25 CMR 344 (1958).

12 U.S. v. Romero, 8 USCMA 524, 25 CMR 28 (1957).

13 Standard provisions which should be included as a subparagraph in paragraph 4 and as paragraph 5b respectively, of every staff judge advocate's review (except acquittals) are suggested in the JAG Chronicle Letter as follows:

***"Convening** Authority's Responsibility.* You, as the convening authority, have the independent power and responsibility to weigh the evidence, judge the credibility of the witnesses, and determine controverted questions of fact. Before approving a finding of guilty you must determine that the finding of guilty is established beyond a reasonable doubt by competent evidence of record (par. 87*a*(3), MCM, 1951)." 57 Chron Ltr *2217.*

"b. The competent evidence of record establishes the accused's guilt beyond a reasonable doubt and the findings of guilty are correct in law and fact." 57 Chron Ltr 31/12. The inclusion of the suggested paragraphs should obviate much appellate litigation.

No less important is the requirement that the review be "individualized" and not tied to a particular command policy or viewpoint.[14] In *United States* v. *Plummer*,[15] the review was found insufficient because the reviewer stated that as a matter of necessity and custom a barracks thief must be eliminated from the service. Chief Judge Quinn speaking for the Court asserted that aconvening authority cannot be told that he is bound by an inflexible administrative or command policy, but that he must heed the fact that an accused is entitled as a matter of right to a careful and individualized review. The staff judge advocate cannot abdicate his responsibility to a higher level. No matter how serious or heinous the crime, there should be an evaluation of the clemency potential.[16] It is a long standing rule, of course, that a convening authority should not be advised that he cannot rely on matter outside a record to set aside findings of guilty.[17]

Although previously concerned with various portions of the review, not until *United States* v. *Vara*[18] did the Court suggest that an accused was entitled to see the review, or any portion thereof, prior to the convening authority's action.[19] However, there, once again faced with the question of the propriety of a convening authority's considering adverse matter obtained from outside the record without affording an accused the opportunity for explanation or rebuttal, the Court made the following comment :

> " . . . . to improve the administration of military justice, to avoid unnecessary reversals, and to bring some semblance of orderly procedure out of what appears to be a rather obscure method of operation, we suggest that a practice of serving a copy of the review, or those parts which contain matters of fact adverse to an accused, on the accused or his counsel sometime prior to action by the convening authority be adopted. The time of service should be early enough to permit a reply thereto if accused is so disposed. If that procedure is used, an accused will be afforded a fair opportunity to answer new matters which are prejudicial to him and to present information which might be helpful to his cause. Furthermore, the convening authority and higher reviewing authorities who have power to modify sentences may be furnished with a more comprehensive and impartial base

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14 U.S. v. Wise, 6 USCMA 472, 20 CMR 188 (1955) ; U.S. v. Peterson, 8 USCMA 241, 24 CMR 51 (1957).

15 7 USCMA 630, 23 CMR 94 (1957).

16 U.S. v. Papciak, 7 USCMA 412, 22 CMR 202 (1956).

17 U.S. v. Massey, 5 USCMA 514, 18 CMR 138 (1955).

18 8 USCMA 651, 25 CMR 155 (1958).

19 *See* U.S. v. Lanford, 6 USCMA 371, 20 CMR 87 (1955).

for determining the appropriateness of sentence. Finally, this Court will not be required to speculate on accused's familiarity with the facts being used against him." [20]

The Court in *Vara*, as noted above, was concerned solely with the right of an accused to rebut and explain adverse matter obtained from outside the record appearing in the review. Recognizing that the Code does not require that an accused be furnished with a copy of the post-trial review, the Court pointed out that Article 38(c), Uniform Code of Military Justice (10 USC 838(c) (1952 ed., Supp. V)), authorizes a trial defense counsel to submit with the record of proceedings "a brief of such matters as he feels should be considered in behalf of the accused on review, including any objection to the contents of the record which he considers appropriate." This right is further spelled out in the Manual for Courts-Martial.[21] The Court reasoned that if an accused is to be able to take full advantage of the right to file a post-trial pleading, where adverse matter from outside the record is contained in the review, he must be provided with an opportunity to consider such comments.

Thus, the present position of the Court is clear. The Code does not require that an accused be given a copy of the post-trial review, but it does permit him to file a post-trial pleading. It is error for a convening authority to consider adverse comments obtained from outside the record without affording an accused an opportunity for explanation or rebuttal. To insure compliance with this rule, the Court has strongly recommended that, prior to action by the convening authority, the accused or his counsel be served with a copy of the review or at least the portion of the review containing such adverse comments. At this point, although concerned with errors in other portions of the review, the Court has not yet suggested that the entire review be given accused in every case as a matter of right. Of course, to the extent that the clemency portion of the review may be compared to the probation report in civilian communities [22] the suggestion contained in *Vara* concerning even that portion of the review conflicts with the position generally taken on the availability of such probation reports to accused.[23] The position taken by jurisdictions denying the accused an opportunity to see the probation report or limiting his access thereto is that a sentencing authority must have available *all* pertinent information in determining an appropriate sentence and that permitting an ac-

[20] **8 USCMA** 654, 25 **CMR 158.**

[21] **Par. 48j**(2).

[22] U.S. **v. Coulter, 3 USCMA 667, 14 CMR 75 (1954)**; Feld, ***The Court-Martial Sentence: Fair or Foul?*, 39 Va. L. Rev. 319, 327 (1953).**

[23] ***See* Note, *Employment of Social Investigation Reports in Criminal and Juvenile Proceedings*, 58** Col. L. Rev. **702 (1958).**

cused to know the source of such information may cause informants, fearful of retaliation, to "dry-up." [24] Of course, the Court of Military Appeals has also taken the position that "Congress did not intend the sentence review to be a guessing game'' and that there "should be a free interchange of facts affecting the sentence." [25] However, the Court apparently finds no inconsistency between the latter concept and providing the accused with access to the "probation" segment of the post-trial review. This view is not totally without civilian support. [26] The suggestion appearing in *Vara* has since been emphatically repeated.[27]

The Court having arrived at its present position, it must now be asked whether other portions of the review or the entire review should be made available to accused or defense counsel as a matter of right or in furtherance of the administration of military justice. The argument that sources of information as to an accused's background, character and potential for rehabilitation are thus revealed and may tend to "dry-up" is of little moment in view of the Court's already announced position. The obviously desirable feature of permitting the accused access to the review prior to the convening authority's action is that it may substantially reduce the number of assertions of error based on the review before the intermediate and highest appellate agencies. Thus, if permitted to see the review, an accused will have an opportunity to challenge the standard set out for the determination of the sufficiency of the evidence at that level. If there is merit to the objection, appropriate action may be taken at the initial appellate level without necessitating the forwarding of the record to intermediate reviewing authorities in its original posture without consideration of accused's contention at the level at which the alleged error occurred and where the most efficaciouscorrective action can be taken. Any suggestion that Article 38(c) of the Code and the Manual for Courts-Martial in providing for post-trial pleadings contemplate that such pleadings be concerned solely with matters arising during the course of trial itself and matters going to clemency would appear to be without foundation. Certainly a defense counsel who claims the existence of a substantial error in the pretrial advice [28] could comment on such error in the authorized post-trial pleading. Neither Article 38(c) nor paragraph 48*j*(2) of the Manual limits post-trial comments to matters occurring at the trial.

"In every court-martial proceeding, the defense counsel may,

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[24] See State v. Moore, 108 A.2d 675, 10 Terry 29 (Del. Super. Ct. 1954).
[25] U.S. v. Lanford, 6 USCMA 371, 20 CMR 87 (1956).
[26] Ala. Code 1940, Tit. 42, § 23; Cal. Pen. Code § 1203 (Supp. 1957); N.M. Stat. Ann. § 13–8–13 (1953); Va. Code Ann. § 53–278.1 (Supp. 1957).
[27] U.S. v. Smith, 9 USCMA 145, 25 CMR 407 (1958).
[28] U.S. v. Greenwalt, 6 USCMA 569, 20 CMR 285 (1955).

in the event of conviction, forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on review, including any objection to the contents of the record which he considers appropriate.'' [29]

A more serious objection to permitting accused general access to the post-trial review is the argument that trial defense counsel, closely identified with the heat of the trial arena, may assert numerous errors going to the review which would not be asserted by someone further removed from the trial forum and having more experience on the appellate level. Undoubtedly there is some merit to this argument. A trial defense counsel may feel strongly disposed to dispute a reviewer's statement as to the sufficiency of the evidence or even a statement as to the events demonstrated by the evidence; also he is very likely to disagree with a reviewer's comment in support of a ruling of the law officer which is adverse to the defense or with the advice furnished the convening authority on the effect of matters occurring at trial.[30] However,

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[29] Art. 38(c), UCMJ.

[30] In United States v. Sulewski (No. 11,433), argued 19 May 1958, the issue certified by The Judge Advocate General of the Army was whether the board of review was correct in ordering a new post-trail review on the ground that the staff judge advocate failed in his review to furnish the convening authority with advice to the effect that the latter must reject the accused's pretrial statements if he believes them to be involuntary. (See US. v. Jones, 7 USCMA 623, 23 CMR 87 (1957).) The staff judge advocate had advised the convening authority that the deposition evidence laying the foundation for the admission into evidence of the accused's pretrial statements was "legally sufficient to support a determination that the accused's oral and written statements were obtained voluntarily, and these admissions were properly admitted in evidence." The staff judge advocate also advised the convening authority that he had the responsibility of weighing the evidence and determining controverted questions of fact and that, before approving a finding of guilt, he must determine the finding to be established beyond a reasonable doubt; further that the law officer had correctly instructed court with respect to the voluntariness of confessions. (The proper Jones instruction had been given the court.) The Government contended that the advice referred to above merely advised the convening authority as a matter of law that the law officer had properly exercised his discretion in admitting the pretrial statements into evidence—whereas the accused contended that such advice would mislead the convening authority into believing that he must consider the statements in determining the guilt or innocence of the accused as the staff judge advocate had failed to advise the convening authority that the latter must reject the pretrial statements of the accused if he found them to be involuntary. Had a copy of the post-trial review been served on the accused or his counsel a reasonable time prior to the action of the convening authority trial defense counsel could have pointed out in his Article 38(c) brief the convening authority's responsibility in this regard. Failure to do so might have constituted a waiver. In either event, extended litigation might thus have been obviated.

even under Article 38(c) as it is generally implemented today, a post-trial pleading may challenge the sufficiency of the evidence, offer an interpretation of circumstantial evidence, or challenge rulings of the law officer, albeit without knowledge of the position adopted by the reviewer with regard to these matters. In spite of this fact, few trial defense counsel file appellate pleadings of any significance. Moreover, under the present system, it is not inconceivable that a defense counsel may expend considerable time and effort to demonstrate the existence of an error which the reviewer has in fact recognized.

Even assuming that the providing of accused with a copy of the review will result in the submission of a larger number of pleadings under Article 38(c), the benefits accruing to the administration of military justice will far outweigh any disadvantages which may be suggested, True, the workload of military legal offices may be increased by the desire to answer assignments of error raised by trial defense counsel. To what extent this would be true is not capable of exact measurement at this time. However, it must be assumed that reviewers will recognize many of the questions raised by such briefs and will be willing, in spite of arguments presented by defense counsel, to stand by their initial analysis of the issue. Moreover, where the assignment of error is deemed to be without merit, a statement to that effect in the review or in an addendum thereto should be sufficient to convince a convening authority since such a statement would be the conclusion of his senior legal advisor. Certainly it is no objection to providing the accused with the post-trial review that reviewing authorities may have to do additional research to deal with assertions of error by trial defense counsel. In providing that a "convening authority shall refer the record of each general court-martial to his staff judge advocate or legal officer, who shall submit his written opinion thereon to the convening authority," [31] it is apparent that the Congress desired that the initial review be a legally informed one regardless of the complexity or number of issues involved in a given case. Even where trial defense counsel's assignment of errors is rejected at all appellate levels, which might be expected in many cases, the considered opinion of the initial reviewer will undoubtedly aid those participating in the review at higher echelons.

The advantages to be derived from providing the accused or his trial defense counsel with an opportunity to examine the review before its submission to a convening authority are several. First, such a system provides the impartial initial reviewer with the advice

[31] **Art. 61,** UCMJ.

of an extremely partisan participant interested in demonstrating the existence of error in the proceedings. Such a participant may be in a position to suggest the existence of error in areas which the reviewer may overlook. The discovery of error in the proceedings at the first review permits the curing of the error by appropriate action of the convening authority, *i.e.*, modifying findings or sentence, dismissing charges and ordering rehearings, without the expense and effort of conducting proceedings at higher appellate levels. It is obviously most desirable to discover errors at the earliest point in the proceeding. In the same vein, errors going to the review only, which often amount to no more than a conflict in semantics, if noted at the convening authority level would obviate the necessity of boards of review ordering the return of the record and the preparation of a new review and action. Finally, where a defense counsel is provided with a copy of the review prior to the submission thereof to the convening authority, failure on his part to object to the contents thereof may be urged as a waiver of such errors on further review. Thus, failure of an accused provided with an opportunity for explanation or rebuttal of adverse matter obtained from outside the record to take advantage of said opportunity precludes his objecting to the convening authority's right to consider such matter as having been obtained from outside the record. Similarly, it may be argued that where a defense counsel is provided with the review prior to the convening authority's action, failure to object to the contents thereof in any particular at that time should preclude an accused, as in the evidentiary area,[32] from raising any error with regard thereto subsequently unless such a rule would result in a manifest miscarriage of justice.

Providing defense counsel with the review prior to action by the convening authority should result in a general improvement of reviews. The knowledge that a qualified attorney will be in a position to challenge directly the statements appearing therein can only result in furthering clarity of expression and in the tightening of legal reasoning employed in the review and impressing upon reviewers the importance of accurate, complete and independent consideration of each record.

It appears, therefore, that under the law as it now exists, it would be in the best interests of military justice to serve on the accused or his counsel, a reasonable time prior to the time the convening authority takes his action on the record of trial, a complete copy of the post-trial review of the staff judge advocate.

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[32] U.S. **v. Masusock, 1** USCMA 32, **1** CMR 32 (1951) ; U.S. **v. Dupree, 1** USCMA 665, **5** CMR 93 (1952) ; see also note **30,** *supra*.

JUDGE ADVOCATE TRAINING IN LOGEX

BY LIEUTENANT COLONEL JOHN F. WOLF *

Just over sixty days had passed since the sudden AGGRESSOR attack on the Tenth United States Army in Germany. A particularly action-filled day was drawing to a close as the Staff Judge Advocate, Tenth Army, discussed the day's developments with his deputy. "This black-market ring just uncovered in General Depot No, 3 is a humdinger. It looks like operations of the ring stretch clear back through the Communications Zone depots and even to the ports. Already more than a hundred Tenth Army personnel are involved. Practically every one of them has asked for individual defense counsel. Undoubtedly, arrangements will have to be made for a large number of individual trials by general court."

The deputy nodded in agreement and said, "I just got a call from the Staff Judge Advocate at Theater Army Logistical Command. He says they have received notice from the French Government that the French are terminating permission for all local procurement for United States Forces in France. The French claim that Article IX of the NATO Status of Forces Agreement gives the Receiving State the power to forbid purchase of any items by the Sending State having an adverse effect on the economy of the Receiving State. The French apparently now feel that our purchases of *anything* in France have an adverse effect on their economy. Theater Army Logistical Command may have to shift local procurement for all United States Forces in Europe from France to Germany. As Tenth Army is the only major United States unit in Germany, Theater Army may direct us to operate the Central Procurement Agency. Responsibility for legal aspects of procurement for the entire Theater is certainly the last thing we need at the moment."

The Army Judge Advocate groaned in acquiescence and asked, "Did I tell you that AGGRESSOR has a reconnaissance satellite?

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Our missile people want to take a crack at it. The Chief wants our opinion by morning as to the legal effect of such action, particularly in view of the fact that because of its present orbit, it will probably be shot down over Switzerland. I've got our International Law experts working on this one, but, to put it mildly, precedents for such a situation are not plentiful."

At this point, a decent regard for the suffering of fellow men should cause us to draw the curtain of time over the perspiring judge advocate participants of LOGEX 58. The situations mentioned are but a small sample of the multitude of legal and operational problems confronting judge advocate participants in LOGEX, the Army's annual logistical training exercise.

LOGEX is a command post exercise and map maneuver conducted during the second week in May for the administrative and technical service schools of the Army with the cooperation of the State Department, Navy, and Air Force. Every year during this exercise, nearly six thousand United States servicemen and women engage in desperate, though bloodless, strife with a familiar enemy—AGGRESSOR.

The four basic purposes of LOGEX, as defined by United States Continental Army Command, may be summarized as follows:

a. Application of service school instruction.

b. Training selected reserve officers.

c. Stressing continuous logistic support in combat.

d. Emphasizing intra- and inter-service cooperation.

Detailed planning for LOGEX is accomplished by the 1st Logistical Command, Fort Bragg, North Carolina, with the assistance of representatives from participating schools and services.

During pre-LOGEX instruction at The Judge Advocate General's School, students of the Advanced Class are assigned to judge advocate sections of the major commands to be played in LOGEX. So far as possible the sections are organized functionally as they might be in reality. Classroom instruction in principles and methods applicable to operation of a staff judge advocate office is related to the LOGEX situation. Office SOP's and command legal directives are prepared by each student judge advocate section. Problems requiring immediate action by judge advocate players when LOGEX begins are considered and analyzed by the students during the pre-LOGEX period. This period of instruction terminates with JAGEX, a two-day command post exercise preceding LOGEX. The dozen or more judge advocate reserve officers participating in LOGEX receive a one-week orientation and refresher course prior to be-

ginning of LOGEX play. Every effort is made to stress realism and practicality in pre-LOGEX training and in student approach to the solution of problems encountered during the exercise.

Anyone familiar with present lines of communication for United States Forces in Europe will recognize the elements of reality in the most recent exercise, LOGEX 58. The situation confronting student players as LOGEX 58 opened on 12 May 1958 is shown by the map in Figure 1.

After several years of cold war, AGGRESSOR launched a surprise atomic air attack against the continental United States and its world-wide complex of bases on 14 March 1958. The United States strategic and overseas tactical air forces struck back instantly in massive retaliation at the military forces and industrial bases of AGGRESSORLAND. The next thirty days saw a sustained exchange of nuclear strikes, and ground war for Western Europe was intensified. Tenth Army was slowly forced back until by D+30 it held a strong defensive position approximately thirty miles east of the Rhine where AGGRESSOR advance was slowed down and finally stopped. An allied general offensive began on 12 May 1958. Both AGGRESSOR and United States Forces had ample nuclear weapons for use against profitable targets. Permanent concentration of troops appeared increasingly unwise.

Fundamental judge advocate responsibilities remained basically unchanged. However, increased mobility, the flexibility of unit assignment, and ever-greater dispersion enlarged the territorial responsibility for judge advocate functions and presented new problems in legal administration and operations. Approximately one hundred judge advocate operational units organized as trial, claims, war crimes, legal assistance, and procurement teams were available for utilization as required.

The major units manned by judge advocate student players in LOGEX 58 were Tenth Army, Theater Army Logistical Command (TALOG), Base Logistical Command (BASELOG), and Advance Logistical Command (ADLOG). Additionally, Navy members of the Sixth Advanced Class of The Judge Advocate General's School, U. S. Army, represented Navy legal offices at the Anti-Submarine Force Headquarters, 3rd Brigade Mobile Construction Battalions, and Headquarters Military Sea Transport Service.

The tempo of play in LOGEX 58 may be accurately described as "fast and furious." During the five days of play the thirty-nine judge advocate players were faced with nearly five hundred planned scenario problems of varying degrees of complexity. In addition, many self-generated problems arose from the actions of

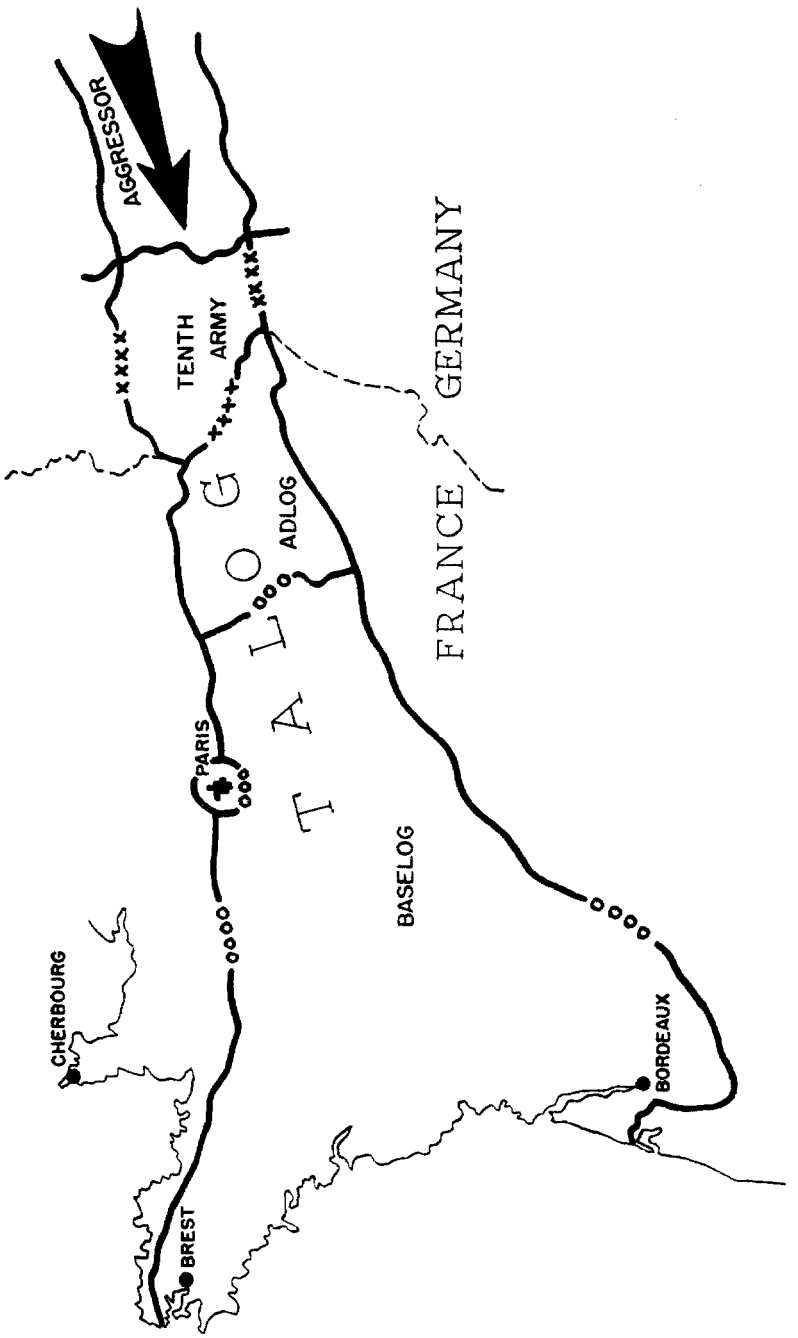


Figure 1. LOGEX 58.

players of other services in the day-to-day development of the situation. At the final critique, one harassed general officer compared his five-day **LOGEX** experience to "trying to take a drink from a fire hose."

In LOGEX ***58*** judge advocate interest was focused on four major problem areas :

a. International law.

b. Employment of judge advocate operational teams.

c. Pilferage from depot stocks and black-marketing.

d. Machine records recording and processing of court-martial statistics.

Most of the problems of international law stemmed from the geographical fact that United States Forces were operating in the territories of friendly and sovereign allies, France and Germany. Relations with the former were governed by the NATO Status of Forces Agreement; with the latter by the Bonn Conventions, as they presently exist. Both of these agreements were negotiated in time of peace. The realities of the battlefield and the frequently urgent necessities facing the combat commander were clearly not uppermost in the minds of their framers.

For LOGEX ***58*** a bilateral agreement was postulated between the United States and France. This agreement, effective at midnight of the first day of play, suspended the operation of many provisions of the NATO Status of Forces Agreement between France and the United States. Other provisions more in line with the realities of a combat situation were substituted. For example, United States Forces were granted primary criminal jurisdiction over United States personnel committing offenses violating United States laws. United States military police were given rights of patrol and investigation outside the immediate areas occupied by United States troops. United States Forces received the right to build communications lines up to thirty miles in length on public roads in France. The frequent need of United States commanders to we and occupy real estate and to procure supplies without complying with formal procedures in advance was recognized. As might be expected, numerous difficulties arose in LOGEX 58 between French officials (represented by umpires) and United States commanders faced with interpreting provisions of the new bilateral agreement. The transitional period during which actions started under the **NATO** Status of Forces Agreement were completed under the new agreement presented many particularly complex problems in a sensitive area of international relations.

LOGEX Germany, having borne the brunt of AGGRESSOR's attack, readily consented informally to the exercise of such authority as United States commanders deemed necessary and the military situation dictated. However, United States commanders were required to act through German governmental agencies to the maximum possible extent. It was recognized that this arrangement was, at best, **a** temporary expedient. Negotiations to amend the Bonn Conventions were proceeding on diplomatic levels. The Commanding General, Tenth Army, directed his judge advocate to prepare recommendations for consideration of higher authority covering provisions for inclusion in the amended Conventions. Preparation of appropriate recommendations and their coordination with other staff sections concerned was a major project for the Tenth Army Judge Advocate Section during the five days of the exercise.

The development of judge advocate operational teams demonstrated the value of LOGEX as a testing ground for new concepts. Experience in LOGEX 56 established that table of organization judge advocate strengths were generally inadequate to furnish an acceptable level of legal support. This was particularly true of the variable strength sections of the Communications Zone. While these might have from forty to ninety thousand or more troops, the judge advocate sections were authorized only five officers. This is the same judge advocate officer strength authorized for divisions normally not exceeding thirteen thousand total personnel.

To meet this problem, and as part of their preparation for LOGEX 57, the members of the Fifth Advanced Class at The Judge Advocate General's School, U. S. Army, tested and assisted in the development of a team concept new to judge advocate operations.[1] This was based on the theory that the unit judge advocate section would perform primarily staff-advisory functions. The operational functions of general court-martial trials, claims, and war crimes investigations were to be accomplished by small judge advocate teams attached to the major commands as the situation required. Tables of organizations were established for such teams, and they were first tested in LOGEX 57. Following this test, the organization and equipment for these units were modified and additional teams for control and administration, legal assistance, and procurement were added. Proposed tables of organization for the teams were submitted to Department of the Army through United States

[1] The development and implementation of the team concept was primarily the responsibility of The Judge Advocate General's School; the Assistant Executive for Reserve Affairs, Office of The Judge Advocate General; and the Command Staff Judge Advocate, Headquarters United States Continental **Army** Command.

Continental Army Command. They have now been approved as judge advocate units by Department of the Army.

In LOGEX 58 judge advocate teams were extensively tested. Particular attention was directed to the areas of administrative control and allocation of the teams. Over one hundred such teams were on LOGEX *58* troop lists. They were Theater Army units but operated under control of the 2251st Judge Advocate Detachment (Control and Administration), which functioned under the TALOG Judge Advocate. These teams provided a new flexibility for judge advocate operations. They were readily shifted from one area to another as backlogs of work or unforeseen crises developed. The promise of their existence in reality vastly improves future prospects for "Total Legal Service" under mobilization conditions,

The black-market problem in LOGEX 58 demonstrated that other circumstances may be as potentially devastating to the logistical effort as enemy nuclear weapans. Virtually all supplies for Tenth Army combat forces funnelled through the two general depots in ADLOG and the two in Tenth Army. For months American supplies had been appearing on European black-markets in increasing quantities. A Frenchman arrested in Paris cast suspicion on depot personnel, and military police criminal investigation agents were planted in the four general depots. On the second day of play, agents in one Tenth Army depot and one ADLOG depot reported dramatic results. Numerous confessions were obtained, implicating over a hundred persons at each depot and many French and German civilians in major European cities. Coordinated apprehension of all these individuals was desirable. A command decision was required as to whether such a large portion of depot personnel, including some individuals in key positions, should be apprehended at once. If so, replacements were required to keep these essential depots operating. Judge advocates were needed to assist in preparation of charges and to ensure that Article 32 investigations were initiated promptly. Tentative plans for trial of a large number of general court-martial cases were necessary. Future use of additional judge advocate trial teams was arranged. Many instances of technical assistance and advice by judge advocate players to provost marshal players occurred in the initial phases of apprehension and investigation in this case.

On the third day of play, one of the suspects at the ADLOG general depot revealed that the black-marketeers operated **a** clandestine depot of their own known as "Macy's Basement" in the woods near Fontainbleu in BASELOG. **A** raid on this depot by BASELOG military police units disclosed large stocks of various United States supplies, thirty **AWOL** servicemen, and large sums of monies of

many national origins. Discovery of these supplies caused logistical staff officers to realize that serious shortages not revealed by electronic accounting might exist in depot stocks. Inventories and stockage adjustments in technical service depots throughout the Theater were directed.

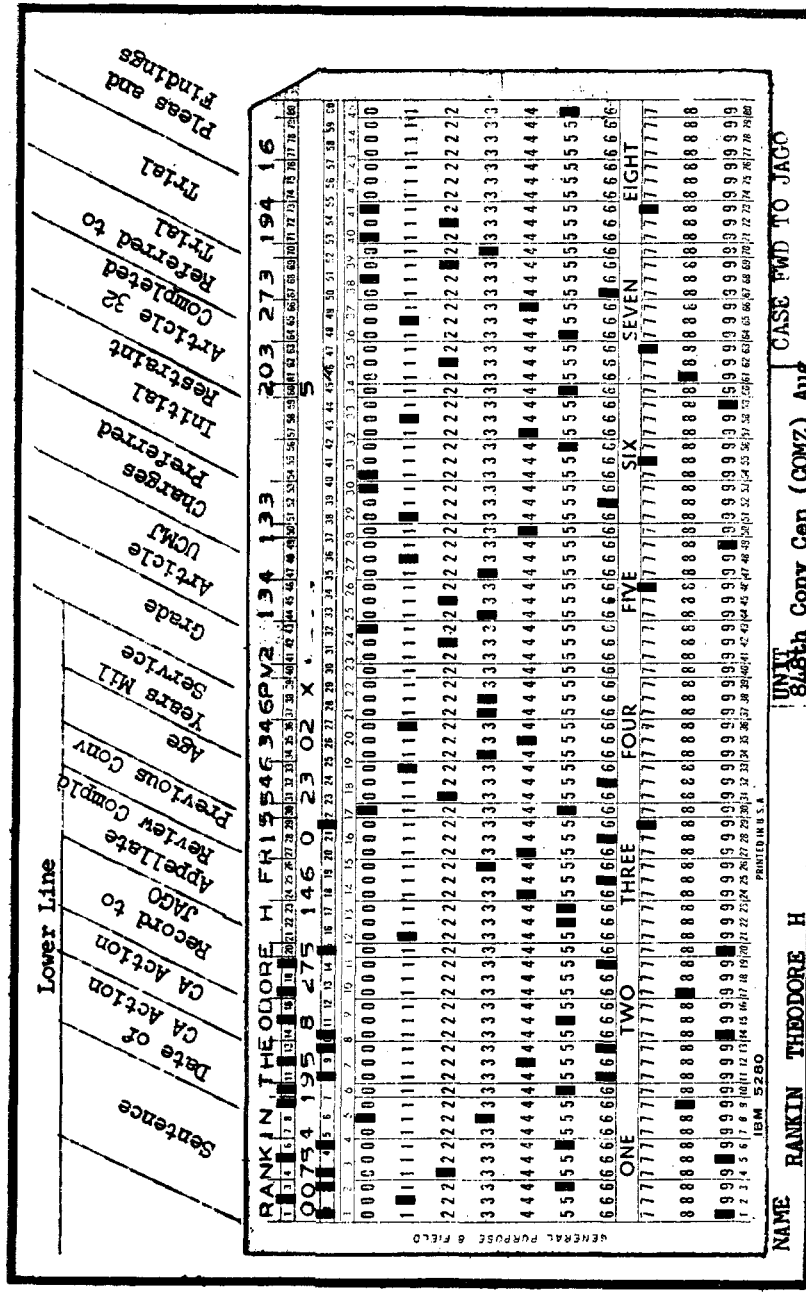
This one problem stimulated the highest degree of coordination between and among provost marshal, judge advocate, general staff, and technical service players in Tenth Army, ADLOG, BASELOG, and TALOG. Its repercussions continued during the final four days of the exercise.

The presence of an operating machine records unit at LOGEX 57 inspired the idea that machine records might be applied to maintenance of court-martial statistics. The thought was advanced that if processing of court-martial cases could be recorded on punch cards a large amount of information not readily available would be at the finger tips of commanders, personnel officers, law enforcement agencies, and judge advocates. It was visualized that this information would be particularly valuable at the Theater Army and Department of the Army level.

Through cooperation of The Adjutant General's School an initial test of this concept was made in LOGEX 58. Information on approximately two thousand general court-martial cases representing those theoretically processed in Tenth Army, ADLOG, and BASELOG from 1 January 1958 to 12 May 1958 was assembled. Twenty-three items of information for each case were entered on punch cards. In some instances, such as sentence and convening authority's action, use of codes was necessary to record the desired information in the space available. Each punch card was stapled to a reading card designed to facilitate its use. The cards were maintained by judge advocate offices in visible card files grouped according to stage of processing from "awaiting advice" to "awaiting appellate review." Space for additional items of information was provided on the reverse side of the reading card. When a change in status took place, a new punch card was furnished the judge advocate by the machine records unit. The unit, of course, retained a complete file of cards for all cases in process. A sample showing the punch card and the reading card appears in Figure 2.

During the play of LOGEX 58, judge advocate players requested numerous reports from machine records units based on the card information. For example:

a. A report of total number of general court-martial cases, January through April, involving sentences of one year or less, and five years or more.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Sentence
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Record to JAGO
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Article 32 Completed
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SIX
SEVEN
EIGHT

Figure 2.

b. A report of number of accused under twenty-one years of age tried for rape, robbery, or assault during the period January through April, and the same information for those over twenty-one.

c. A report showing persons tried January through April who had one, two, or three previous convictions.

The monthly court-martial statistical report required by Theater Army was likewise prepared by machine records. The machines could, of course, return only the information given them. Daily reports of changes in status of court-martial cases were essential to keep machine records unit card files up to date. Machine records in LOGEX 68 revealed an ability to provide detailed information in a remarkably short time. A broad range of correlations of items such as age, grade, previous convictions, unit, and type of offense was shown to be possible. While the test was not sufficiently detailed or complete to be conclusive, it did demonstrate that use of machine records for maintaining court-martial statistics warranted further detailed study.

A wide variety of other problems in the fields of military justice, military affairs, claims, legal assistance, international law, procurement, and war crimes kept judge advocate participants fully occupied during LOGEX 58. Manning of the three Navy legal offices by Navy members of the Sixth Advanced Class provided an opportunity for inter-service play of great benefit to all participants. The use of sixteen enlisted students of the Court Reporting (Electronic) Course, then in session at The Judge Advocate General's School, as enlisted assistants gave them valuable training in judge advocate administration.

Judge advocate participation and interest in LOGEX have grown steadily in the decade of its existence as an annual event. Techniques of play and problem areas, benefiting from past experience and the contributions of many individuals, have been steadily refined and improved. Besides accomplishing its stated purposes, LOGEX furnishes The Judge Advocate General's Corps an unsurpassed vehicle for developing and testing new concepts and ideas and for acquainting other services with them. If Total Legal Service becomes a reality on the battlefields of the future, it will owe much to the playing fields of **LOGEX.**

SURVEY OF THE LAW

MILITARY JUSTICE: THE UNITED STATES COURT OF MILITARY APPEALS 29 NOVEMBER 1951 TO 30 JUNE 1958

The following essays were prepared by officers of the Government Appellate Division of the Office of The Judge Advocate General of the Army for inclusion in *Briefing on Landmark Cases*, an intra-office publication. Each essay reflects the opinions of the author and does not necessarily represent the views of the Office of The Judge Advocate General or any other governmental agency.

As portions of a survey of the law, these essays attempt to present a broad, inclusive picture of the activities of the United States Court of Military Appeals without analyzing in detail any particular facet thereof.

I. PRETRIAL PROCEDURE; CHARGES AND SPECIFICATIONS; ARTICLE 31

Even before charges have been preferred against him a suspect is entitled to the advice of—and perhaps the presence of—counsel of his own choosing, though not appointed military counsel, during an interrogation by law enforcement agents.[1] Article 32 of the Code provides that at the impartial investigation which must precede the reference of a charge to a general court-martial, the accused must be advised of his right to be represented at this investigation by civilian counsel provided by himself, by military counsel of his own selection if reasonably available, or by military counsel appointed for him. These provisions have been construed to mean that the Government cannot exclude an accused's civilian counsel from the Article 32 investigation unless he has been disbarred from practice before courts-martial,[2] and that if military counsel is appointed to represent the accused at the investigation he must be qualified within the meaning of Article 27(b) of the Code.[3]

Article 34 of the Code requires a convening authority, before directing trial by general court-martial, to refer the charges to his staff judge advocate for advice. The accused has a right to expect that the staff judge advocate will make an independent and pro-

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1 U.S. v. Melville, 8 USCMA 597, 25 CMR 101 (1958); U.S. v. Gunnels, 8 USCMA 130, 23 CMR 354 (1957).

2 U.S. v. Nichols, 8 USCMA 119, 23 CMR 343 (1957).

3 U.S. v. Tomaszewski, 8 USCMA 266, 24 CMR 76 (1957). This right can be waived. U.S. v. Mickel. 9 USCMA 324, 26 CMR 104 (1958).

fessional examination of the expected evidence and that he will submit to the convening authority his impartial opinion as to whether it supports the charge.[4]

Although errors in the pretrial investigation[5] or in the giving of the advice of the staff judge advocate[6] are not jurisdictional, they may be. sufficient to require reversal when the accused can show that he suffered prejudice.

An accused is entitled to have the court by which he is tried appointed by a convening authority who, considering all the facts and circumstances, has no personal interest in the outcome of the trial.[7] "he function of a convening authority in referring a case to trial involves the exercise of a judicial judgment and, hence, is a non-delegable act which is a prerequisite to jurisdiction in the court-martial.[8] While the convening authority's exercise of his discretion will not be reviewed, an accused has a right to individual consideration of his case and the officer exercising jurisdiction must in fact give his attention to each case.[9] The function, however, rests in the office and not in the individual, and therefore a subordinate commander may become the convening authority through the devolution of command.[10] The fact that the officer who referred the case to trial was not the same person who received the staff

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4 U.S. v. Schuller, 5 USCMA 101, 17 CMR 101 (1954).

5 Defect held not prejudicial: U.S. v. Mickel, 9 USCMA 324, 26 CMR 104 (1958); U.S. v. Allen, 5 USCMA 626, 18 CMR 250 (1955); U.S. v. McCormick, 3 USCMA 361, 12 CMR 117 (1953). Defect held prejudicial: U.S. v. Tomaszewski, 8 USCMA 266, 24 CMR 76 (1957); U.S. v. Nichols, 8 USCMA 119, 23 CMR 343 (1957); U.S. v. Parker, 6 USCMA 75, 19 CMR 201 (1955).

6 Defect held not prejudicial: U.S. v. Allen, 5 USCMA 626, 18 CMR 250 (1955). Defect held prejudicial: U.S. v. Greenwalt, 6 USCMA 569, 20 CMR 285 (1955); U.S. v. Schuller, 5 USCMA 101, 17 CMR 101 (1954).

7 Personal interest: U.S. v. Shepherd, 9 USCMA 90, 25 CMR 352 (1958) (false official statement arising out of convening authority's "fat boy" program); U.S. v. Marsh, 3 USCMA 48, 11 CMR 48 (1953) (willful disobedience of direct order of convening authority); U.S. v. Gordon, 1 USCMA 255, 2 CMR 161 (1952) (attempt to burglarize convening authority's home). No personal interest: U.S. v. Doyle, 9 USCMA 302, 26 CMR 82 (1958) (offenses arose out of fund-raising drive of which convening authority was chairman); U.S. v. Smith, 8 USCMA 178, 23 CMR 402 (1957) (convening authority ordered amendment of charges to allege greater offense); U.S. v. Hainison, 5 USCMA 208, 17 CMR 208 (1954) (instructions to trial counsel over command line of convening authority); U.S. v. Keith, 3 USCMA 579, 13 CMR 135 (1953) (disobedience of order issued over convening authority's command line).

8 U.S. v. Roberts, 7 USCMA 322, 22 CMR 112 (1956); U.S. v. Greenmalt, 6 USCMA 569, 20 CMR 285 (1955); U.S. v. Williams, 6 USCMA 243, 19 CMR 369 (1955); U.S. v. Bunting, 4 USCMA 84, 15 CMR 84 (1954).

9 *Cf.* U.S. v. Wise, 6 USCMA 472, 20 CMR 188 (1955).

10 U.S. v. Bunting, 4 USCMA 84, 15 CMR 84 (1954).

judge advocate's pretrial advice is immaterial if each officer was the convening authority at the time of his action.[11] A convening authority, through his staff judge advocate, should assume the responsibility for insuring that serious cases, and death cases in particular, are not set for trial before ample time has been given both parties to prepare for trial.[12]

The membership of a court-martial is a matter within the exclusive control of the convening authority. Not only can he appoint the members of the court, but he has the power to excuse members whom he has appointed. And he may delegate his power to excuse to an impartial official such as his staff judge advocate or the president of the court—if the excusal is to be only upon a showing of good cause.[13]

Traditional tests are used to determine the sufficiency of charges and specifications: do they allege, either expressly or by implication, all of the elements of the offense; do they sufficiently apprise the accused of the offense which he must defend against; and do they protect him against the danger of a future prosecution for the same offense.[14] When charges have been preferred within the relevant statutory period of limitations, if the accused is brought to trial after the running of that period he should be brought to trial under the *original* charge sheet (adding amendments thereto where necessary) and not under redrafted charges contained in a completely new charge sheet.[15]

A major problem in the field of charges and specifications is the question of when an unreasonable multiplication of charges has occurred. The problem is no less vexing because it generally affects only the maximum authorized sentence.[16] At present, the Court of Military Appeals is revamping the military law of multiplicity on a case-by-case basis, but it appears to be basing its rulings upon a liberal application of two tests: [17] is one offense included within

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11 U.S. v. Williams, 6 USCMA 243, 19 CMR 369 (1955).

12 U.S. v. McFarlane, 8 USCMA 96, 23 CMR 320 (1957); U.S. v. Parker, 6 USCMA 75, 19 CMR 201 (1965).

13 U.S. v. Allen, 5 USCMA 626, 18 CMR 250 (1965).

14 U.S. v. Sell, 3 USCMA 202, 11 CMR 202 (1953). *Compare* U.S. v. Fout, 3 USCMA 665, 13 CMR 121 (1953), with U.S. v. Scioli, 7 USCMA 502, 22 CMR 292 (1957).

15 U.S. v. Rodgers, 8 USCMA 226, 24 CMR 36 (1957).

16 U.S. v. Drexler, 9 USCMA 405, 26 CMR 186 (1968).

17 Worthy of note, but not fitting either criteria suggested, is U.S. v. Rosen, 9 USCMA 176, 26 CMR 437 (1958), which held the following to be a single offense for purposes of punishment: making and presenting a fraudulent military pay order, forgery of a false signature to the same order and using that false signature, and the larceny that resulted from the false claim.

another,[18] and does the evidence used to prove one offense also prove another.[19]

Although a discussion of all substantive offenses would not be appropriate in this summary, it may be helpful to note some of the decisions of the Court of Military Appeals which have defined the bounds of the general article—Article 134.[20] The gravamen of—and an essential element *of*—*all* offenses within the ambit of Article 134 is prejudice to good order and discipline or discredit to the armed forces,[21] but these concepts can be considered in the light of ancient military custom which has become well entrenched in military tradition.[22] Excluded from Article 134 are offenses covered by specific punitive articles and conduct which Congress can be said to have intended to be punished under a specific punitive article or not at all. Thus, all instances of criminal conversion must be laid under Article 121 and all absence offenses must be laid under Articles 85, 86, or 87.[23] Recent decisions have held that the following acts do not fall under Article 134 or any other punitive article: a

18 U.S. v. Bridges, 9 USCMA 121, 25 CMR 383 (1958) (missing movement through neglect or design, and absence without leave); U.S. v. Walker, 8 USCMA 640, 25 CMR 144 (1958) (robbery and aggravated assault); U.S. v. Morgan, 8 USCMA 341, 24 CMR 151 (1957) (sodomy and assault with intent to commit sodomy).

19 U.S. v. Welch, 9 USCMA 255, 26 CMR 35 (1958) (absence without leave and breach of arrest or escape from confinement); U.S. v. Taglione, 9 USCMA 214, 25 CMR 476 (1958) (absence without leave and breach of parole); U.S. v. Modesett, 9 USCMA 152, 25 CMR 414 (1958) (absence without leave and breach of restriction); U.S. v. Dicario, 8 USCMA 353, 24 CMR 163 (1957) (interference with the mails by taking letters, and larceny of their contents); U.S. v. Brown, 8 USCMA 18, 23 CMR 242 (1957) (larceny and wrongful disposition of military property by the same act). Compare with the above U.S. v. Williams, 9 USCMA 400, 26 CMR 180 (1958) (absence without leave and breach of arrest) and U.S. v. Real, 8 USCMA 644, 25 CMR 148 (1958) (interfering with the mail by opening and secreting letters, and stealing their contents).

20 The third clause of Article 134—crimes and offenses not capital—is not included in this discussion since it is assimilative rather than general in nature.

21 U.S. v. Grosso, 7 USCMA 566, 23 CMR 30 (1957); U.S. v. Gittens, 8 USCMA 673, 25 CMR 177 (1958); U.S. v. Williams, 8 USCMA 325, 24 CMR 135 (1957). *Cf.* U.S. v. Grimes, 9 USCMA 272, 26 CMR 62 (1958).

22 U.S. v. Waluski, 6 USCMA 724, 21 CMR 46 (1956); U.S. v. Downard, 6 USCMA 538, 20 CMR 254 (1955); U.S. v. Kirksey, 6 USCMA 556, 20 CMR 272 (1955).

23 U.S. v. Smith, 9 USCMA 236, 26 CMR 16 (1958) (false swearing in a judicial proceeding); U.S. v. Deller, 3 USCMA 409, 12 CMR 165 (1953) (absence with intent to avoid basic training); U.S. v. Johnson, 3 USCMA 174, 11 CMR 174 (1953) (missing movement); U.S. v. Norris, 2 USCMA 236, 8 CMR 36 (1953) (wrongful taking). *Cf.* U.S. v. Fuller, 9 USCMA 143, 25 CMR 405 (1958) (burning with intent to defraud an insurance company); U.S. v. Holt, 7 USCMA 617, 23 CMR 81 (1957) (misconduct in operation of bingo games).

passenger's fleeing the scene of an accident, when nothing more is alleged;[24] unlawful entry into an automobile;[25] giving a bad check for or refusing to pay a gambling debt;[26] and negligent indecent exposure.[27]

One of the most important issues dealt with by the Court of Military Appeals is the proper interpretation of Article 31. In every case involving the admissibility of an accused's pretrial statement, there must be two inquiries: was the confession obtained as a result of coercion, unlawful influence, or unlawful inducement; and was the accused properly informed of his rights.[28] The accused need not be informed of his rights in the precise language of Article 31,[29] but he must be apprised of the nature of the accusations[30] and be informed that he need not make any statement regarding the offense and that any statement made by him may be used in evidence against him at a subsequent trial.[31] Telling the accused of his rights is of no avail, of course, if he is not able to understand them.[32] When an accused alleges that his pretrial statement was obtained in violation of Article 31, both the law officer and the court—under proper instructions tailored to the precise aspect of Article 31 in issue[33]—must consider the allegations and disregard the statement *entirely* if a violation is found.[34]

Using Article 31 as a guide, three classes of situations involving evidence obtained through an accused may be discerned: First, situations in which the evidence falls completely outside of Article 31, such as where an accused is compelled to give fingerprints, to don clothing, or to permit himself to be viewed by witnesses or jurors.[35] Second, situations in which the evidence involves only the problem of compulsory self-incrimination (Article 31(a)), such as asking an accused to speak for purposes of voice identification[36] or to provide a urine sample.[37] Third, situations involving *state-*

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24 U.S. v. Petree, 8 USCMA 9, 23 CMR 233 (1957).
25 U.S. v. Gillin, 8 USCMA 669, 25 CMR 173 (1958).
26 U.S. v. Lenton, 8 USCMA 690, 25 CMR 194 (1958).
27 U.S. v. Manos, 8 USCMA 734, 25 CMR 238 (1958).
28 U.S. v. Wilson, 2 USCMA 248, 8 CMR 48 (1953).
29 U.S. v. O'Brien, 3 USCMA 325, 12 CMR 81 (1953).
30 U.S. v. Dickenson, 6 USCMA 438, 20 CMR 154 (1955); U.S. v. Davis, 8 USCMA 196, 24 CMR 6 (1957).
31 U.S. v. Williams, 2 USCMA 430, 9 CMR 60 (1953).
32 U.S. v. Hernandez, 4 USCMA 465, 16 CMR 39 (1954).
33 U.S. v. Dison, 8 USCMA 616, 25 CMR 120 (1958).
34 U.S. v. Jones, 7 USCMA 623, 23 CMR 87 (1957).
35 *Cf.* U.S. v. Eggers, 3 USCMA 191, 11 CMR 191 (1953).
36 See U.S. v. Brown, 7 USCMA 251, 22 CMR 41 (1956); U.S. v. Greer, 3 USCMA 576, 13 CMR 132 (1953).
37 U.S. v. Booker, 4 USCMA 335, 15 CMR 335 (1954). See U.S. v. Jordan, 7 USCMA 452, 22 CMR 242 (1957).

ments made by an accused, in which case the issues are whether the accused was advised of his rights (Article **31**(b)) and whether the statement was the product of coercion, unlawful influence, or unlawful inducement (Article **31**(d)). By expanding the concept of "assertive conduct,"[38] however, the Court of Military Appeals is moving in the direction of eliminating the distinction between statements and other incriminating evidence. Thus, the Court has held recently that a handwriting exemplar[39] and the act of producing one's liberty pass are statements.[40]

The mere fact that an accused has been advised of his rights under Article **31** does not mean that any statement obtained thereafter is admissible. If actions prior or subsequent to the warning effectively negate a free exercise of the right to remain silent, a later statement is inadmissible even though the formal rquirements of Article **31** have been met.[41] If an accused's pretrial statement is admitted into evidence when the statement was obtained in violation of Article **31,** the case must be reversed unless the accused has made a judicial confession.[42] On some occasions, the Court of Military Appeals has held that an accused, by failing to object at trial, can waive an objection to the admission of a pretrial statement on the ground that he had not been advised of his Article **31** rights. This is not an inflexible rule, and it will be utilized only where it does not result in depriving the accused of a fair trial or producing a manifest miscarriage of justice.[43] Finally, it is error to receive into evidence testimony that during an interrogation the accused exercised his rights under Article **31** by refusing to answer question~.~LT. CHESTER F. RELYEA AND LT. PETER J. HUGHES.

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38 U.S. v. Taylor, **5** USCMA **178, 17** CMR **178 (1954)** (identification of clothing).

39 U.S. v. Minnifield, 9 USCMA **373, 26** CMR **153 (1958).**

40 U.S. **v.** Nowling, **9** USCMA **100, 25** CMR **362 (1958).** *Cf.* U.S. v. Musguire, **9** USCMA 67, 25 CMR **329 (1958).**

41 U.S. v. Washington, 9 USCMA **131, 25** CMR **393 (1958)** (promise to keep statement confidential) ; U.S. v. Spero, 8 USCMA **110, 23** CMR **334 (1957)** (prior statement obtained without warning) ; U.S. **v.** Bennett, **7** USCMA **97, 21** CMR **223 (1956)** (prior statement obtained without warning) ; U.S. v. Payne, **6** USCMA **225, 19** CMR **361 (1966)** (confession obtained by trick) ; U.S. **v.** Monge, **1** USCMA **95, 2** CMR **1 (1952)** (prior coerced confession).

42 **U.S. v.** Trojanowski, **5** USCMA **305, 17** CMR **305 (1954)** ; U.S. v. Williams, 8 USCMA **443, 24** CMR **253 (1957).**

43 U.S. v. Fisher, **4** USCMA **152, 15** CMR **152** (1954) ; U.S. **v.** Shaw, **9** USCMA **267, 26** CMR **47** (1958) ; U.S. v. Kelley, **7** USCMA **584, 23** CMR **48 (1957).**

44 U.S. v. Kowert, **7** USCMA **678, 23** CMR **142 (1957).**

II. COMMAND INFLUENCE AND JURISDICTION

Instances of command influence have been comparatively rare under the Code. However, when the Court has found it to exist, condemnation of the exercise of improper control has been swift and decisive. The problem in this area is to insure every accused a trial free from unlawful influence and at the same time not to restrict a commander unduly in his exercise of military discipline. The Court has recognized that many members of courts-martial are unfamiliar with the Code and the Manual and need instruction on both. Thus, a commander is faced with a problem as to how far he can go in instructing his court members before he enters into the realm of unlawful influence. In *Littrice*[45] the members of the court were informed immediately before trial **(1)** that inadequate sentences bring the services into disrepute, **(2)** the prerogatives of the convening authority as to commutation of sentences should not be usurped, **(3)** the findings and sentence arrived at by the court are relatively unimportant because the case receives a thorough review at higher headquarters, and **(4)** that a court member's good performance would be reflected in his efficiency report. The Court was quick to find that command influence had been exercised in this case. However, in *Navarre*[46] the Court pointed out that a commander after reviewing many records of trial and finding that justice in the command was not being administered equally could instruct his command to avoid this practice. The Court has also reminded us that the convening authority will not be allowed to exercise the powers of the law officer even though the former can dissolve a court or change its personnel. This arose in *Knudson*[47] where the convening authority overruled the law officer's decision to grant a continuance.

More recently, an Army commander announced a policy that all Regular Army offenders with two previous convictions should be considered for elimination from the service. The first method to be considered was trial by general court-martial, so that section B of the Table of Maximum Punishments could be utilized to its fullest extent. This policy was to be brought to the attention of all court members. The Court held this to be unlawful command influence.[48]

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[45] 3 USCMA 487, 13 CMR 43 (1953). See also U.S. v. Fowle, 7 USCMA 349, 22 CMR 139 (1956); U.S. v. Estrada, 7 USCMA 635, 23 CMR 99 (1957). *But* cf. U.S. v. Isbell, 3 USCMA 782, 14 CMR 200 (1954).

[46] 5 USCMA 32, 17 CMR 32 (1964).

[47] 4 USCMA 587, 16 CMR 161 (1954).

[48] U.S. v. Faulkner, 7 USCMA 304, 22 CMR 94 (1956); U.S. v. Hawthorne, 7 USCMA 293, 22 CMR 83 (1956).

It is not only the convening authority who may be guilty of exercising command influence. The Court has held, in the *Deain*[49] case, that the president of a court who sits as a permanent member thereof and makes out fitness and efficiency reports on the other permanent members may be exercising command influence. The staff judge advocate may be guilty of exercising command influence in his pretrial indoctrination conferences. In *Zagar*[50] the staff judge advocate informed the court members immediately before trial that because of careful preparation of the case a person would not be brought to trial **(1)** if the crime had not been committed and **(2)** if the defendant had probably not been the person who did it. In *Whitley*[51] the president of a special court-martial was replaced when he refused to admit certain Government evidence. In both of these cases, the Court held that unlawful influence had been exercised by the staff judge advocate.

A staff judge advocate cannot intervene in an actual trial process. The Court has held that if he attempts to influence the president of a court during trial as to the proper law, this constitutes fatal error. In *Guest*[52] the defense counsel made a motion for a finding of not guilty. Counsel argued this motion in closed session before the law officer out of the hearing of the court. Meanwhile, inside the courtroom the staff judge advocate was showing to the president of the court a dissenting opinion which he had written when a member of an Army board of review. The law officer granted the defense motion. The president objected to this ruling and told the law officer to read the staff judge advocate's dissenting opinion to the court. After this was done, the court overruled the law officer and the motion for the finding of not guilty was denied. Held by the Court: fatal error. Thus, we see that the Court has tried to balance military necessity and the guarantee of a fair trial.

Attention may now be turned to the question of jurisdiction. In this area, it is essential to remember that it is the status of the offender and not the locus of the offense which gives a court-martial jurisdiction over an accused. The question of when this jurisdiction first attaches was considered in *Ornelas*[53] where the accused was convicted for desertion. He had gone to an induction center and submitted to a physical examination. However, he took no oath, never stepped forward, nor raised his hand. Before the Court, accused contended that there had been no lawful induction. The

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49 5 USCMA 44, 17 CMR 44 (1954).
50 5 USCMA 410, 18 CMR 34 (1955).
51 5 USCMA 786, 19 CMR 82 (1955).
52 3 USCMA 147, 11 CMR 147 (1953).
53 2 USCMA 96, 6 CMR 96 (1952).

Court held that the oath-taking ceremony was the crucial point in the induction process which alters the status of a civilian to that of a soldier. Consequently, the court-martial lacked jurisdiction.

In the *Solinsky*[54] decision, the Court considered the problem of when jurisdiction terminates. There the accused's two-year enlistment had not expired, and he was given an honorable discharge for the convenience of the Government so that he could reenlist. This he did the day following his discharge. During his original enlistment he had committed certain postal offenses, for which he was subsequently tried and convicted. He claimed that the honorable discharge prevented trial by court-martial for those crimes. The Court determined that there was no hiatus in his status and that he had at all times remained subject to military law and control. The opinion observed that accused's discharge was for reenlistment purposes and that he never actually returned to civilian status. Here the discharge and reenlistment were simultaneous, thus preventing a hiatus.

The ***Downs***[55] case is another significant jurisdictional decision. There the accused had enlisted for four years, and this enlistment was involuntarily extended for one year. During this period of extended enlistment, he suffered a broken leg, necessitating a stay in the hospital six months beyond expiration of his extended period of service. Upon recovery, accused was given thirty days leave, from which he failed to return. Thereafter, he was apprehended and convicted for desertion over his objection that jurisdiction ceased upon completion of the extended enlistment. The Court held that enlistment is a contract and accomplishes a change of status; hence, legal modes of separation are essential before one is formally discharged. Military jurisdiction continues notwithstanding expiration of the enlistment period.

However, when an accused has enlisted while under seventeen years of age the disability of youth prevents him from acquiring military status. Therefore, in the *Blanton*[56] and *Taylor*[57] cases, where the accused were fourteen and fifteen, respectively, courts-martial lacked jurisdiction to try them for desertion. The incompetence of tender years simply precludes such youths from entering into a lawful military status.

An allied question was resolved in the *Gallagher*[58] case. There the accused committed several serious offenses, including murder,

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54 2 USCMA 153, 7 CMR 29 (1963).
55 3 USCMA 90, 11 CMR 90 (1953).
56 7 USCMA 664, 23 CMR 128 (1957).
57 8 USCMA 24, 23 CMR 248 (1957).
58 7 USCMA 506, 22 CMR 296 (1957).

while a prisoner of war in Korea. His enlistment expired 12 October 1951. After repatriation, he requested reenlistment for three years, and accordingly he was honorably discharged and reenlisted in October 1953. Charges were preferred in October 1955, and in due course conviction and sentence to life imprisonment resulted. The Court held that Article 3(a) of the Code served to subject the accused to court-martial jurisdiction for offenses during the Korean conflict. This case is to be compared with ***Toth*** v. *Quarles*.[59] In the latter decision, the United States Supreme Court held that a former serviceman was not subject to court-martial jurisdiction, after returning to civilian status, for offenses committed during his military service. Thus, the fact that the accused Gallagher reenlisted is of vital importance.

Recently, court-martial jurisdiction over civilians has been the subject of considerable litigation in addition to that of the ***Toth*** case. In the ***Covert*** and ***Krueger*** decision[60] handed down by the United States Supreme Court, it was held that Article 2(11) of the Code, providing for trial by court-martial of all persons accompanying the armed forces in foreign countries, could not constitutionally be applied to civilian dependents in capital cases in time of peace. Four members of the Court were prepared to hold that courts-martial lacked jurisdiction over all civilians in time of peace, while one justice refused to rule beyond the necessities of the cases before the bar. Still another justice would deny jurisdiction only in capital cases. Two justices dissented. Therefore, it became an open question whether courts-martial had jurisdiction over civilian employees in all cases and civilian dependents in non-capital cases when such persons accompany the armed forces in foreign countries in time of peace. It is clear, however, that there is no jurisdiction to try civilian dependents in capital cases under such circumstances. Thus, four important prior decisions by the Court of Military Appeals in the *Marker*,[61] *Schultz*,[62] *Robertson*,[63] and ***Rubenstein***[64] cases would still retain vitality. In ***Marker*** the accused was employed by the Tokyo Ordnance Depot as the superintendent of a plant producing tires. He accepted a house, a coat for his wife, and a paid vacation from the company operating the plant. For these acts, he was tried and convicted by court-martial. The court held that although the accused was a civilian at all times, he was accompanying the armed forces and employed by the Army. The products

59 350 U.S. 11 (1965).
60 Reid v. Covert, 354 U.S. 1 (1957).
61 1 USCMA 393, 3 CMR 127 (1952).
62 1 USCMA 512, 4 CMR 104 (1952).
63 5 USCMA 806, 19 CMR 102 (1955).
64 7 USCMA 523, 22 CMR 313 (1957).

of his plant were going directly to Korea for use by United States troops. He worked under direct supervision of Army officers and was held to be subject to military jurisdiction. In the *Schultz* proceeding, the defendant was a former Air Force captain living in Japan. Upon being separated, he requested and received a commercial entry permit and driving license. Later he became the manager of an officers' club. While driving a car, he struck and killed two Japanese, resulting in his trial and conviction by a court-martial. The court held that "accompanying and serving with" connote a direct relationship between the accused and the armed forces. He was not employed by the armed forces at the time of the accident or trial but was in a civilian status and had merged with the civilian population. The fact that he was the manager of an officers' club did not vest the military with jurisdiction. In the ***Robertson*** case, the accused was a merchant seaman and a member of the crew of a private vessel allocated to the Military Sea Transport Service. While his ship was discharging cargo in a Japanese port, he went ashore and became engaged in a fight, as a result of which a charge of premeditated murder was referred for trial to a Navy general court-martial, and Robertson was convicted of unpremeditated murder. The Court held that the defendant was accompanying the armed forces when his vessel was allocated to the Navy for the use of transporting military cargo. It was observed that he did not merge with the civilian population while he was ashore for a brief period.

In the *Rubenstein* case, the Court was confronted with a novel question of jurisdiction over an employee accompanying the armed forces. The accused went to Japan as a Department of the Army clerk-typist. Later he took employment as the manager of a civilian club operated on an Air Force base for the benefit of Air Force civilian employees on duty there. The club was a nonappropriated fund activity subject to military control and supervision. Accused, who enjoyed PX and commissary privileges and was paid in military currency, expressly contracted to remain subject to military jurisdiction. He availed himself of the opportunities afforded by his job to engage in black market activities. He was suspected of the offenses and directed to report daily to the investigators. Disregarding this, he fled to his home in Michigan in 1962. Over a year later, he voluntarily returned as a commercial entrant to Korea where he was apprehended and removed to Japan to stand trial. The Court reasoned that accused retained close contact with the military even after becoming club manager, thus vesting jurisdiction over him at the time of the offenses. Additionally, the Court held that his flight to the United States did not terminate jurisdic-

tion, particularly when he voluntarily returned to an area over which military law was supreme.

Returning to the *Toth* case, the Supreme Court there held unconstitutional Article 3(a) of the Code which purports to confer jurisdiction to try former members of the armed forces, saying that a person who has severed all relations with the military and who has returned to the United States cannot be subjected to trial by court-martial. Contending that *Toth* established the rule that civilians could not be tried by courts-martial, Burney, a civilian employee of the Philco Corporation accompanying the Air Force outside the territorial jurisdiction of the United States, attacked the validity of Article 2(11) before the Court of Military Appeals. The Court held that Article to be a reasonable and necessary exercise of the congressional authority to make rules for the government and regulation of the armed forces. Finding the intent of the drafters of the Constitution to be to assure basic guarantees of due process to each citizen, the Court held that a court-martial would provide persons accompanying the armed forces overseas more elements of due process than any practical alternative.[65]

The Court of Military Appeals has sustained the constitutionality of Article 2(11) of the Code in a case decided subsequent to the Supreme Court's decision in the *Covert* and *Krueger* cases. Accused [66] was a civilian employed by the Department of the Army in the Comptroller Division, Berlin Command. He was convicted by general court-martial of a number of sex offenses. The Court of Military Appeals examined the nature of Wilson's relationship with the armed forces and concluded that he was "in" the armed services for purposes of Article 1, Section 8, Clause 14, of the United States Constitution. The Court therefore held that as to employees such as Wilson, Article 2(11) of the Uniform Code is constitutional. LT. THOMAS M. LOFTON AND LT. EDWARD S. NELSON.

111. EVIDENCE

In addition to the usual method of adducing evidence, that is, through the testimony of witnesses, court-martial practice frequently sees the presentation of evidence through the use of stipulations, official records such as morning reports, and depositions. With regard to stipulations, it has been held by the Court of Military Appeals that a defense counsel may stipulate to all or part of the prosecution's case even without the express consent of the accused because of the implied authority that he has to act for the

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65 U.S. v. **Burney,** 6 USCMA 776, 21 CMR 98 (1956).

66 U.S. **v.** Wilson, 9 USCMA 60. 25 CMR 322 (1958).

accused in procedural matters.[67] The decisions covering stipulations have not been so much concerned with their admissibility as with their construction. Generally, the Court has held that stipulations should be construed to give effect to the intention of the parties but, at the same time, has insisted that that intention be clearly expressed and has refused to construct a stipulation from negative conduct of the parties.[68] Thus, in a series of cases, the Court has refused to find apprehension in order to aggravate sentences in desertion cases where the parties stipulated at trial that the accused were apprehended by civilian authorities because such a stipulation does not rule out the possibility that an accused nevertheless initiated his return to military control voluntarily.[69]

However, an entry in a morning report that accused was "apprehended by civilian authorities" was held sufficient to warrant a finding of involuntary return to military control in the case of *United States* v. *Simone*[70] because Army regulations impose an affirmative duty to record in a morning report entry the circumstances surrounding an absentee's return to military control. Prior to the decision in the *Simone* case, morning reports and service record entries had been held competent to establish the inception date of an unauthorized absence,[71] escape from confinement,[72] and a breach of arrest.[73] A morning report of a headquarters has been held sufficient to show an absence from a larger unit,[74] as has the morning report of the unit to which accused is assigned been held competent to establish an absence from a unit to which he is attached.[75] Additionally, it should be noted that the mere fact that morning report entries are delayed, or that there are delayed corrections thereto, or that there exist inconsistencies between several morning reports or other official records introduced in evidence does not affect the admissibility thereof but goes only to the weight to be accorded them,[76] a question for resolution by the court-martial as triers of fact. For an officialrecord to be admissible as evidence of a fact or event, of course, it must have been made in the per-

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67 U.S. v. Cambridge, 3 USCMA 377, 12 CMR 133 (1953).
68 U.S. v. Valli, 7 USCMA 60, 21 CMR 186 (1956).
69 U.S. v. Crawford, 4 USCMA 701, 16 CMR 275 (1954); U.S. v. Salter, 4 USCMA 338, 15 CMR 338 (1954); U.S. v. Beninate, 4 USCMA 98, 15 CMR 98 (1954).
70 6 USCMA 146, 19 CMR 272 (1955).
71 U S. v. Masusock, 1 USCMA 32, 1 CMR 32 (1951).
72 U.S. v. Wilson, 4 USCMA 3, 15 CMR 3 (1954).
73 U.S. v. Lowery, 2 USCMA 315, 8 CMR 115 (1953).
74 U.S. v. Jack, 7 USCMA 235, 22 CMR 25 (1956).
75 U.S. v. Mitchell, 7 USCMA 238, 22 CMR 28 (1956).
76 U.S. v. Takafuji, 8 USCMA 623, 25 CMR 127 (1958); U.S. v. McNamara, 7 USCMA 575, 23 CMR 39 (1957); U.S. v. Anderten, 4 USCMA 354, 15 CMR 354 (1954).

formance of a legally imposed duty to record.[77] Thus, unrequired service record entries reflecting that an accused was on duty at a given date were held insufficient to rebut a conflicting prosecution official record establishing an absence.[78] In this area, the Court of Military Appeals has indicated that it will indulge in the presumption of regularity to establish the officiality of records.[79]

Because of the great mobility of our military personnel, depositions are undoubtedly used more often in court-martial practice than they are in civilian practice. There are, however, certain limitations restricting their use. For example, in *United States* v. *Drain*,[80] the Court held that in order to be admissible in *general* courts-martial the deposition must be taken before a duly certified officer and while the accused is represented by counsel duly certified as competent in accordance with Article 27 of the Code.

Although it is not necessary that the accused be present at the taking of the deposition,[81] it is absolutely essential that he be represented by counsel of his choice (and not one appointed without his knowledge or consent) who has had an opportunity to discuss the case with him prior to its taking. Accordingly, in the case of *United States* v. *Miller*,[82] a deposition introduced at trial was held inadmissible when it appeared that counsel representing the accused was appointed only a few hours before the deposition was taken and had no opportunity to discuss the case with his newly acquired client who was out of town on authorized leave, who, unknown to military justice personnel, had retained civilian counsel, and who had no notion that the deposition was to be taken. Furthermore, once a case has been referred to trial, no counsel other than the regularly appointed counsel may be designated to represent the parties at the deposition, even though taken at some distance from the place of trial.[83]

Again, in *United States* v. *Valli*,[84] the Court said that depositions are, for the most part, "tools for the prosecution which cut deeply into the privileges of an accused''[85] and will be permitted only where the procedural requirements set forth in the Code and Manual are complied with. While it is true that minor procedural irregularities

77 Par. 144*b*, MCM, 1951.
78 U.S. v. McNamara, 7 USCMA 575, 23 CMR 39 (1957)
79 U.S. v. Moore, 8 USCMA 116, 23 CMR 340 (1957).
80 4 USCMA 646, 16 CMR 220 (1954).
81 U.S. v. Sutton, 3 USCMA 220, 11 CMR 220 (1953); U.S. v. Parrish, 7 USCMA 337, 22 CMR 127 (1956).
82 7 USCMA 23, 21 CMR 149 (1956).
83 U.S. v. Brady, 8 USCMA 456, 24 CMR 266 1957).
84 7 USCMA 60, 21 CMR 186 (1956).
85 *Id.* at 64, 21 CMR 190.

may be waived by failure of defense counsel to interpose objection thereto, the Court refused in the *Valli* case to find a waiver where a complete disregard for the procedural requirements was demonstrated. More recently, however, in *United States* v. *Ciarletta,*[86] a deposition was held admissible despite numerous irregularities, all found either technical and immaterial or waived by a failure to assert timely objection.

Moreover, under the Code depositions may not be used in a capital case unless either the convening authority directs that the case be treated as noncapital or the accused expressly consents to its use.[87] As many offenses such as desertion, attempted desertion, or sleeping or being drunk on post while acting as a sentinel are made punishable by death in time of war, it has been necessary for the Court in deciding whether depositions were admissible in trials for such offenses committed during the Korean hostilities to determine whether the Korean conflict constituted a war. In the leading case of *United States* v. *Gann,*[88] the Court, regarding the actual existence of armed hostilities and not the formal declaration of war as decisive, held that the Korean conflict was a war for the purposes of administering military justice. In the *Gann* case, the accused was convicted of two charges, one alleging desertion which, under the decision, was a capital offense, and one alleging the willful disobedience of a lawful order of a noncommissioned officer, a noncapital offense. It is interesting to note that the deposition in that case was held admissible despite the existence of a war because it related only to the noncapital offense of willful disobedience and, therefore, in the opinion of the Court did not contravene the Code's prohibition of the use of depositions in capital cases.

The question of whether the Korean conflict constituted a war has arisen in still other areas. Thus, in *United States* v. *Bancroft,*[89] where the accused was tried and convicted by a special court-martial for sleeping on post while acting as a sentinel in Korea, the entire trial proceedings were held void, for, under the Code,[90] special courts-martial have no jurisdiction over capital cases. Again, in *United States* v. *Ayers,*[91] it was held that a desertion commenced on 23 December 1950, after the inception of the Korean war, was a wartime desertion without a statute of limitations despite the fact that the offense was committed within the continental limits of the

86 7 USCMA 606, 23 CMR 70 (1957).
87 Art. 49, UCMJ.
88 3 USCMA 12, 11 CMR 12 (1953).
89 3 USCMA 3, 11 CMR 3 (1953).
90 Art. 19, UCMJ.
91 4 USCMA 220, 15 CMR 220 (1954).

United States. In *United States* v. *Sanders,*[92] the Court held that by 4 June 1955, the important date in that case, because armed hostilities were over and because of other circumstances, the war in Korea was over. Finally, in *United States* v. *Shell,*[93] it was held that the Armistice in Korea on 27 July 1953 ended those actual hostilities essential to a finding of "war" for purposes of military law.

Turning our attention to the field of *real evidence,* it is unnecessary to state that this type of evidence is frequently introduced in courts-martial. However, real evidence which is obtained as a result of an unreasonable search and seizure is inadmissible as violative of the fourth amendment injunction that persons shall be secure from unreasonable searches and seizures. There is no fixed rule for determining whether a search is unreasonable, and each case must be decided on its own particular facts and circumstances.94 Examples of searches which are considered reasonable and, therefore, lawful are (1) a search authorized by a search warrant, (2) a search incident to lawful arrest or apprehension,[95] (3) a search under circumstances demanding immediate action to prevent the removal or disposal of property believed on reasonable grounds to be criminal goods,[96] (4) a search made with the freely given consent of the possessor of the property searched,[97] (5) a search of property under the control of the United States, which search has been authorized by a commanding officer or one to whom he has delegated his authority.[98] It must be remembered that the fruit of a lawful search which follows an unlawful search and which was conducted because of information derived from the preceding search is inadmissible as evidence because of the punitive rule followed in the Federal courts and adopted by the Manual.[99] Where a confession obtained in violation of Article 31 of the Code leads the investigators to real evidence, the real evidence is admissible de-

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92 7 USCMA 21, 21 CMR 147 (1956).

93 7 USCMA 646, 23 CMR 110 (1957).

94 U.S. v. DeLeo, 5 USCMA 148, 17 CMR 148 (1954); U.S. v. Swanson, 3 USCMA 671, 14 CMR 89 (1954).

95 U.S. v. Dutcher, 7 USCMA 439, 22 CMR 229 (1956).

96 U.S. v. Swanson, 3 USCMA 671, 14 CMR 89 (1954).

97 U.S. v. Berry, 6 USCMA 609, 20 CMR 325 (1956); U.S. v. Wilcher, 4 USCMA 215, 15 CMR 215 (1954).

98 U.S. v. Doyle, 1 USCMA 545, 4 CMR 137 (1952); U.S. v. Davis, 4 USCMA 577, 16 CMR 151 (1954); U.S. v. Swanson, 3 USCMA 671, 14 CMR 89 (1954). See U.S. v. Volante, 4 USCMA 689, 16 CMR 263 (1954). See also U.S. v. Ball, 8 USCMA 25, 23 CMR 249 (1967).

99 Silverthorne Lumber Co. v. U.S., 251 U.S. 385 (1920); par. 152, MCM, 1951, p. 288.

spite the Article 31 violation.[100] [Ed. Note. Since 30 June 1958, the Court of Military Appeals appears to have overruled its former cases and decreed the foregoing evidence inadmissible. *U. S. v. Haynes* (No. 11,189), 7 October 1958.] In determining whether an illegal search may invalidate a confession subsequently obtained, the criterion is whether, in a particular case, the confession may be said to have been prompted by the evidence unearthed by the illegal search.[101] Furnishing the warning required by Article 31 might then constitute at least one circumstance indicating the interruption of a chain of causation. Parenthetically, it might be noted that under the case of *United States* v. *Bennett* [102] a confession obtained after compliance with Article 31 requirements which follows an unlawfully obtained admission or confession may nevertheless be admissible if the prosecution shoulders the burden of showing that the taint of the first confession has been attenuated. More recently, the Court has amplified the reasoning in the *Bennett* case in explaining that the problem is simply one of proof of voluntariness—whether a subsequent confession is the product of illegal evidence or the expression of the free will of the accused.[103]

Of special interest are the decisions concerning the use of wiretap evidence. The leading case is *United States* v. *Noce* [104] in which the Court stated that wiretap evidence is not prohibited by the Constitution but by Section 605 of the Federal Communications Act [105] which prohibits the unauthorized interception and publication of communications. Thus, in each case involving the interception of messages the admissibility of the evidence so obtained depends on whether the interception falls within the purview of the Communications Act. In the *Noce* case, the Court specifically held that telephone calls over exclusively military systems did not fall within the Act's proscription. The Court also pointed out that the mere fact that a trunk connection with a public commercial system may be effected by dialing does not render a system nonmilitary. In *United States* v. *De Leon*,[106] it was held that the Act did not prohibit listening in on an established and existing extension. In *United States* v. *Gopaulsingh*,[107] where the interception occurred in

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100 U.S. v. Fair, 2 USCMA 521, 10 CMR 19 (1953); par. 140, MCM, 1951, p. 261.

101 U.S. v. DeLeo, 5 USCMA 148, 17 CMR 148 (1954).

102 7 USCMA 97, 21 CMR 223 (1956).

103 U.S. v. Spero, 8 USCMA 110, 23 CMR 334 (1957). See also U.S. v Green, 7 USCMA 539, 23 CMR 3 (1957).

104 5 USCMA 716, 19 CMR 11 (1955).

105 48 *Stat.* 1103 (1934), 47 U.S.C. 605 (1952).

106 5 USCMA 747, 19 CMR 43 (1965).

107 5 USCMA 772, 19 CMR 68 (1955).

Korea, it was held that the Act has no application in foreign countries.

The most interesting decisions in the field of real evidence, perhaps, are the cases regarding the use of blood and urine samples. Unfortunately, they are also among the most confusing. In United States v. *Williamson,*[108] it was held that body fluids, blood, and urine may be extracted from the blood stream consistent with due process requirements if brutal means are not used. In that case, urine was extracted from accused by means of catheter administered while he was unconscious. Because the specimen was extracted without the use of brutality and in accordance with recognized medical procedures, it was held admissible in evidence. In United States v. Jones[109] and United States v. *Speight,*[110] the Court held that catheterization over the protest of an accused is prohibited.

Parenthetically, it might be added here—with reference back to the prior discussion of Article 31 problems—that the Court has held that a warning under Article 31 does not have to precede the extraction of body fluids.[111] In reaching this result, the Court analogized the taking of blood fluids to cases involving the taking of fingerprints or requiring accused persons to don articles of clothing.[112] Additionally, it may be noted that the Court originally drew a distinction between the body fluid situation and the handwriting and voice exemplar cases[113] and held in *Barnaby* that a person suspected of an offense may be ordered by superior authorities to furnish a body fluid specimen.[114] However, as a result of a change in personnel on the Court of Military Appeals, a majority held an order directed to an accused to furnish a body fluid sample for use as evidence in a prosecution to be illegal.[115] Despite reservations found in the principal and concurring opinions, it appears clear that the import of the Jordan case is to overrule the prior law represented by *Williamson* and *Barnaby, supra.*

It is of course clear that usually urine and blood samples are not physically introduced into evidence. Instead, experts are called to the witness stand to interpret and report the results of laboratory

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108 4 USCMA 320, 15 CMR 320 (1954).
109 5 USCMA 537, 18 CMR 161 (1955).
110 5 USCMA 668, 18 CMR 292 (1955).
111 U.S. v. Booker, 4 USCMA 335, 15 CMR 335 (1954).
112 See also U.S. v. McGriff, 6 USCMA 143, 19 CMR 269 (1955), holding an Article 31 warning unnecessary prior to the taking of a handwriting exemplar.
113 U.S. v. Greer, 3 USCMA 576, 13 CMR 132 (1953); U.S. v. Eggers, 3 USCMA 191, 11 CMR 191 (1953); U.S. v. Rosato, 3 USCMA 143, 11 CMR 143 (1953).
114 U.S. v. Barnaby, 5 USCMA 63, 17 CMR 63 (1954).
115 U.S. v. Musguire, 9 USCMA 67, 25 CMR 329 (1958); U.S. v. Jordan, 7 USCMA 452.22 CMR 242 (1957).

analyses of the samples. This is but one illustration of the use of expert testimony in trials by court-martial. Very generally, experts may be called upon to testify as to matters which are not within the knowledge of men of common experience and education but which require special skill or training in some art, profession, trade, or science.[116] The scope of expert testimony, however, is not unlimited.[117] The Navy discovered this in the case of *United States* v. *Adkins*[118] in which the prosecution produced a naval intelligence officer who had personally investigated over 300 cases of homosexuality. He testified that in almost 100 percent of the cases where a homosexual names his partner the identification is accurate. The Court, stating that it doubted whether anyone could qualify as an expert on the veracity of homosexuals and finding that the naval intelligence officer did not so qualify, held that the admission of his testimony into evidence constituted prejudicial and reversible error. Of course, it is clear that written treatises are not admissible in evidence.[119]

Under the Manual for Courts-Martial, the opinions of lay witnesses may in certain instances be elicited by examination.[120] Generally speaking, this may be done where the testimony sought involves sensory perception which by its nature requires the submission of a conclusion to the jury. A common and classic example is the sensory perception of taste and smell. The field of character evidence furnishes another example of the use of the opinion of laymen, for under the present Manual for Courts-Martial character evidence may be shown either by establishing general reputation in the community or by the opinion of lay witnesses who have a sufficiently close acquaintance with the person whose character is in issue so as to be able to form a reliable judgment.[121] This provision is an innovation, for it constitutes a departure from the prevailing civilian rule and changes the old military rule. However, this departure from prior law does not overturn the old established principle prohibiting proof of bad character through the use of specific acts of misconduct.[122] This principle is of course founded, in turn, on the salutary rule that an inference of guilt may not be raised from a mere showing that the accused has a propensity for committing criminal acts.[123] Like all evidentiary rules, there are certain well

116 Par. 138*e*, MCM, 1951.
117 For a discussion of the cross-examination of experts, see U.S. v. McFerren, 6 USCMA 486, 20 CMR 202 (1955).
118 5 USTMA 492, 18 CMR 116 (1955).
119 U.S. v. Webb, 8 USCMA 70, 23 CMR 294 (1957).
120 Par. 138*e*, MCM, 1951.
121 U.S. v. Haimson, 5 USCMA 208, 17 CMR 208 (1954).
122 *Ibid.*
123 U.S. v. Warren, 6 USCMA 419, 20 CMR 135 (1956).

defined exceptions. Accordingly, specific acts of misconduct may be shown where it is relevant on the issue of motive,[124] intent, guilty knowledge, where it shows a definite pattern of conduct, where it negates a claim of mistake [125] or rebuts a defense of an accused. [126] Accordingly, in the leading cases of *United States* v. *Powell*[127] and *United States* v. *Graham*,[128] desertion cases, the Court held admissible in evidence proof of prior unauthorized absences and breach of arrest and a table of time lost from the accused's service record as relevant to the intent to remain away permanently. Mere suspicion of other offenses is, of course, inadmissible.[129]

Heretofore, our discussion has been limited to proof of character on the merits of the case. With regard to the impeachment of character by cross-examination, different rules apply. Leading cases in this area are *United States* v. *Moore*,[130] *United States* v. *Berthiaume*,[131] and *United States* v. *Gibson*.[132] In these cases, it was held that once a witness takes the stand to testify he places his credibility in issue. Similarly, an accused who testifies in his own defense sheds any special privileges or immunities that he may have as an accused and, like any ordinary witness, places his credibility in issue. To fully protect his rights, however, the Court has held that the law officer should admonish the court-martial not to consider the proof of bad character so elicited in resolving the question of guilt or innocence. On cross-examination, questions may be asked about prior acts of misconduct even if they have never been reduced to a conviction, provided only that such misconduct touches on the issue of credibility. But the crass-examiner may not indicate that he is in possession of rebuttal evidence (which is inadmissible) in the event the witness denies the act of misconduct.[133] Where prior misconduct has resulted in convictions, the Court has clearly delineated the type of convictions that may be shown. Any conviction by civilian courts for an offense which may be characterized as a felony may be brought out. It is important to note an important qualification on this general rule, however, where an accused is sought to be impeached by his prior juvenile misconduct. In the recent case of *United States* v. *Roark*,[134] it was held reversi-

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124 U.S. v. Boyd, 7 USCMA 380, 22 CMR 170 (1956).
125 *Ibid.*
126 U.S. v. Harris, 6 USCMA 736, 21 CMR 58 (1956).
127 3 USCMA 64, 11 CMR 64 (1953).
128 5 USCMA 265, 17 CMR 265 (1954).
129 U.S. v. Kelley, 7 USCMA 584, 23 CMR 48 (1957).
130 5 USCMA 687, 18 CMR 311 (1955).
131 5 USCMA 669, 18 CMR 293 (1955).
132 5 USCMA 699, 18 CMR 323 (1965).
133 U.S. v. Shepherd, 9 USCMA 90, 25 CMR 362 (1958).
134 8 USCMA 279, 24 CMR 89 (1957).

ble error to permit impeachment by a showing that accused had been committed by a juvenile court because of acts involving moral turpitude, this result following from a policy underlying state statutes to protect infants from their indiscretions. Military convictions for offenses for which a dishonorable discharge or a sentence of one year or more is *imposable* may be shown without regard to the type of court-martial that tried the case or the sentence actually imposed. The Court has also held that the cross-examiner does not necessarily have to know the facts behind this question, provided that the question is not used to mask an allegation of misconduct.[135] Of course, the cross-examiner is bound by the answer of the witness. Finally, it should be noted that in *United States* v. *Brown,*[136] where the accused took the stand and stated that he had never committed any other offenses, it was held that *subsequent* acts of misconduct, that is, misconduct committed after the date of the commission of the principal offense, could provide subject matter for cross-examination. The opinion of a witness as to the truth and veracity of an accused who has testified is admissible as well as reputation testimony concerning this trait.[137]

Perhaps the most compelling method of proof in court-martial cases is the pretrial extrajudicial confession of an accused. In an earlier discussion, it has been pointed out that before a confession may be introduced in evidence the prosecution must show affirmatively that a warning pursuant to Article 31 of the Code preceded its taking. We here advert to another requisite which must be met before a confession can be introduced, and that is that the confession be supported by a *corpus delicti,* for one of the basic rules of military justice is that an accused person may not legally be convicted upon his uncorroborated confession. With regard to *corpus delicti,* it is clear that it may be furnished by either direct or circumstantial evidence that a crime has *probably* been committed by someone.[138] It is unnecessary to establish the commission of a crime beyond a reasonable doubt, and it is unnecessary to establish the criminal agency of the accused.[139] The Court has held, however, that the corroborative evidence necessary to furnish a *corpus delicti* must touch on each element of the offense charged.[140] In this

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135 *Cf.* U.S. v. Russell, 3 USCMA 696, 14 CMR 114 (1954).

136 6 USCMA 237, 19 CMR 363 (1955).

137 U.S. v. Turner, 6 USCMA 445, 18 CMR 69 (1955); par. 140*a*, MCM, 1951.

138 U.S. v. Petty, 3 USCMA 87, 11 CMR 87 (1953).

139 *Ibid.*

140 U.S. v. Villasenor, 6 USCMA 3, 19 CMR 129 (1955); U.S. v. Mims, 8 USCMA 816, 24 CMR 126 (1957); U.S. v. Leal, 7 USCMA 15, 21 CMR 141 (1956); U.S. v. Isenberg, 2 USCMA 349, 8 CMR 149 (1952).

respect, the military rule requiring corroboration is much stricter than the rule announced by the United States Supreme Court, for that Court has held that all that is required to support an extra-judicial confession is evidence establishing its trustworthiness.[141] It is also the rule in military law that a confession may not be corroborated by other confessions or admissions of an accused. However, in *United States* v. *Villasenor,*[142] the Court qualified this to some extent by holding that confessions or admissions made prior to, or contemporaneously with, the commission of the offense charged may be used to furnish corroborating evidence. LT. RICHARD W. YOUNG AND LT. ARNOLD I. BURNS

IV. THE ROLE OF THE TRIAL PARTICIPANTS; AFFIRMATIVE DEFENSES; APPEAL AND ERROR

The proper role of the participants at the trial level in court-martial proceedings has long received considerable attention from the Court of Military Appeals. Under the Uniform Code of Military Justice, trial counsel retains the same character he has always possessed in military justice. In *United States* v. *Valencia,*[143] the Court stated that his commendable desire to win a case must be tempered with a realization of his responsibility for insuring a fair and impartial trial conducted in accordance with proper legal procedure. In this respect, he has the duty of arranging to have present all material witnesses whether favorable or unfavorable to an accused,[144] and he must not attempt to use his questions or arguments as a vehicle to prejudice accused.[145] In this connection, he may not bring to a court's attention a policy directive as to appropriate punishment.[146] His arguments, if tending to be inflammatory, must be based on matters found within the record[147] and cannot "go beyond the bounds of fair argument."[148] Violations of these responsibilities have sometimes required reversal of proceeding ~Although matters of vital importance to an accused. such as correct instructions on the essential elements of the offense charged, have generally been held not to be the subject of waiver,[150] the Court has emphatically expressed its view that a defense

141 Opper v. U.S., 348 U.S. *84* (1954).
142 6 USCMA 3, 19 CMR 129 (1955).
143 1 USCMA 415, 4 CMR 7 (1952).
144 U.S. v. Vigneault, 3 USCMA 247, 12 CMR 3 (1953).
145 U.S. v. Russell, 3 USCMA 696, 14 CMR 114 (1954).
146 U.S. v. Fowle, 7 USCMA 349, 22 CMR 139 (1956).
147 U.S. v. Doctor, 7 USCMA 126, 21 CMR 252 (1956).
148 U.S. v. Day, 2 USCMA 416, 425, 9 CMR 46, 55 (1953); U.S. v. Olson, 7 USCMA 242, 22 CMR 32 (1956).
149 U.S. v. Yerger, 1 USCMA 288, 3 CMR 22 (1952).
150 U.S. v. Williams, 1 USCMA 186, 2 CMR 92 (1952).

counsel does not do justice to his client nor does he fulfill his duty as an officer of the court when he relies principally on error and its discovery on appellate review to protect the rights of his client.[151] Thus, a defense counsel may waive his client's rights in the following matters by failing to interpose timely objection or seek appropriate relief: separate trial,[152] speedy trial,[153] ineligibility of a court member,[154] inadequacy of the pretrial advice,[155] timeliness of the staff judge advocate's pretrial advice,[156] the admission of evidence obtained by search and seizure,[157] the admission of evidence generally,[158] admissions of an accused,[159] character evidence,[160] improper argument of trial counsel,[161] certain procedural requirements for depositions,[162] and ambiguities in instructions.[163] Where clear, affirmative waiver by counsel is evident, the Court has consistently refused to allow an accused to complain on appeal.[164] However, where a defense counsel's limited references to an event take the form of rebuttal prompted by the prosecution's introduction of inadmissible evidence, the Court will not import waiver.[165]

Under the Uniform Code, the chief figure at the trial is the law officer. The Court has placed him in a position analogous to that of a Federal judge.[166] In *United States* v. *Jackson,*[167] it was stated that his duty under the Code is to direct the trial along paths of recognized procedure in a manner calculated to bring an end to the hearing without prejudice to either party. The law officer must provide the court with instructions on the applicable law, and, in this connection, the Court has held that it is improper to provide court members with a copy of the Manual for Courts-Martial for

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151 U.S. v. Smith, 2 USCMA 440, 9 CMR 70 (1953). See also U.S. v. Wolfe, 8 USCMA 247, 24 CMR 57 (1957).
152 U.S. v. Bodenheimer, 2 USCMA 130, 7 CMR 6 (1953).
153 U.S. v. Hounshell, 7 USCMA 3, 21 CMR 129 (1956).
154 U.S. v. Thomas, 3 USCMA 161, 11 CMR 161 (1953).
155 U.S. v. McCormick, 3 USCMA 361, 12 CMR 117 (1953).
156 U.S. v. Allen, 5 USCMA 626, 18 CMR 250 (1955).
157 U.S. v. Dupree, 1 USCMA 665, 5 CMR 93 (1952).
158 U.S. v. Masusock, 1 USCMA 32, 1 CMR 32 (1951).
159 U.S. v. Fisher, 4 USCMA 152, 15 CMR 152 (1954).
160 U.S. v. Turner, 5 USCMA 445, 18 CMR 69 (1955).
161 U.S. v. Sims, 5 USCMA 115, 17 CMR 115 (1954).
162 U.S. v. Valli, 7 USCMA 60, 21 CMR 186 (1956). See also U.S. v. Ciarletta, 7 USCMA 606, 23 CMR 70 (1957).
163 U.S. v. Felton, 2 USCMA 630, 10 CMR 128 (1953).
164 U.S. v. Massey, 5 USCMA 514, 18 CMR 138 (1955); U.S. v. Bowers, 3 USCMA 615, 14 CMR 33 (1954); U.S. v. Mundy, 2 USCMA 500, 9 CMR 130 (1953).
165 U.S. v. Miasel, 8 USCMA 374, 24 CMR 184 (1957).
166 U.S. v. Berry, 1 USCMA 235, 2 CMR 141 (1952).
167 3 USCMA 646, 14 CMR 64 (1954).

use either in open court or in their closed session deliberations.[168] Within the framework of his obligations, the law officer has been accorded the right to make restrained comments on the evidence[169] and to exercise control in order to avoid cluttering up the proceedings with unnecessary, immaterial, or repetitious matters.[170] In most cases, he can cure any error resulting from the improper conduct of counsel or improperly admitted evidence by admonishing the court to disregard such matters.[171]

The law officer must maintain a scrupulously fair and impartial attitude and must not abuse the broad discretion possessed by him.[172] The fact that this broad discretion actually exists is clear from United States v. *Parker*,[173] where the law officer's action in refusing counsel an opportunity to ask several questions on voir dire examination was sustained. The power entrusted to a law officer is abused when he improperly denies a continuance,[174] improperly denies a motion for mistrial,[175] refuses counsel a brief recess to prepare closing argument,[176] excludes character evidence favorable to accused,[177] curtails cross-examination severely,[178] participates with the court members in reaching the findings in closed session,[179] discusses the case with court members during a recess,[180] or arbitrarily refuses to entertain argument on an interlocutory question.[181] A law officer should do nothing in preparing for trial which may affect his impartiality[182] or anything during trial which tends to demonstrate a lack of impartiality.[183] Participation in some aspects of a case before trial may disqualify a person from subsequently acting as law officer. Thus, in *United* States v. *Renton*,[184] it was held that a law officer who had assisted the officer preparing the charges against an accused by drafting appropriate sample specifi-

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168 U.S. v. **Rinehart,** 8 USCMA 402, 24 CMR **212 (1957).**
169 U.S. v. Andis, **2** USCMA **364, 8** CMR **164 (1953).**
170 U.S. v. **Jackson,** 3 USCMA **646, 14** CMR **64 (1954).**
171 U.S. v. **Patrick, 8** USCMA **212, 24** CMR **22 (1957)** ; U.S. **v. O'Briski, 2** USCMA **361, 8** CMR **161 (1953).**
172 U.S. **v. Ballard,** 8 USCMA **561, 25 CMR** 65 (1958) ; **U.S.** v. **Jackson,** 3 USCMA 646, 14 CMR **64 (1954).**
173 **6** USCMA **274, 19** CMR **400 (1855).**
174 U.S. v. **Plummer, 1** USCMA **373, 3** CMR **107 (1952).**
175 **U.S. v. Diterlizzi, 8** USCMA **334, 24** CMR **144 (1957); U.S. v. Richard, 7** USCMA **46, 21** CMR **172 (1956).**
176 U.S. v. **Sizemore, 2** USCMA **572, 10** CMR 70 **(1953).**
177 U.S. v. **Browning, 1** USCMA **599, 5** CMR **27 (1952).**
178 U.S. **v. Berthiaume, 5** USCMA **669, 18** CMR **293 (1955).**
179 U.S. v. **Keith, 1** USCMA **493, 4** CMR **85 (1952).**
180 U.S. v. **Walters, 4** USCMA **617, 16** CMR **191 (1954).**
181 U.S. v. **Walker, 9** USCMA **187, 25** CMR **449 (1958).**
182 U.S. v. **Fry, 7** USCMA **682, 23** CMR **146 (1957).**
183 U.S. v. **Kennedy,** 8 USCMA **251, 24** CMR **61** (1957).
184 **8** USCMA **697,** 25 CMR **201** (1958).

cations had become totally incompetent to serve as law officer at the trial, And in United States v. *Turner*[185] the Court indicated that it would be error for one who prepares the pretrial advice to later act as law officer in a given case.

The most onerous responsibilities of the law officer concern his duty to provide the court-martial with appropriate instructions on the law of the case. First and foremost, he must fully and correctly instruct a tribunal on every element of the offense charged.[186] This duty is not satisfied by mere reference to the Manual[187] or reference to opinions in cited cases,[188] and an instruction couched in the exact language of the Manual may not suffice if it does not clearly delineate the basic issues to the court-martial.[189]

The requirement as to instructions on the essential elements of offenses charged now causes law officers little difficulty.[190] However, other instructional requirements still result in fatal omissions in the instructional framework provided the court by the law officer. The Court has consistently required complete instructions on all lesser included offenses raised by the evidence as reasonable alternatives to the offense charged[191] unless rejected by defense counsel.[192] The problem of what constitutes a lesser included offense has been rendered somewhat more difficult by those decisions of the Court which depart from the "elements test"—that is, all elements of lesser included offenses must be present in the principal offense. On occasion, as in United States v. *Malone*,[193] it has been held that an offense may be lesser included in the offense charged although it requires proof of an element not necessary to the proof of the greater offense when the language of the specification embraces this additional element. Thus, an assault in which grievous bodily harm has been intentionally inflicted may be a lesser included offense of assault with intent to commit voluntary manslaughter, although a battery is essential to the lesser offense and not necessary to proof of the greater offense. Indeed, in at least two decisions the Court

185 9 USCMA 124, 25 CMR 386 (1958).

186 U.S. v. Clay, 1 USCMA 74, 1 CMR 74 (1951).

187 U.S. v. Cromartie, 1 USCMA 551, 4 CMR 143 (1952); U.S. v. Gilbertson, 1 USCMA 465, 4 CMR 57 (1952).

188 U.S. v. Chaput, 2 USCMA 127, 7 CMR 3 (1953).

189 U.S. v. Jett, 5 USCMA 476, 18 CMR 100 (1955); U.S. v. Grossman, 2 USCMA 406, 9 CMR 36 (1953). Cf. U.S. v. Cothern, 8 USCMA 158, 23 CMR 382 (1957).

190 But see U.S. v. Williams, 8 USCMA 325, 24 CMR 135 (1957).

191 U.S. v. Clark, 1 USCMA 201, 2 CMR 107 (1952); U.S. v. Simmons, 1 USCMA 691, 5 CMR 119 (1952).

192 U.S. v. Wilson, 7 USCMA 713, 23 CMR 177 (1967); U.S. v. Mundy, 2 USCMA 500, 9 CMR 130 (1953).

193 4 USCMA 471, 16 CMR 45 (1954).

has held that the law officer must look to the evidence as well as the specification in order to determine what offenses are included in that charged, holding that assault with a dangerous weapon was a lesser included offense of robbery, where the specification merely alleged that the taking was by force and violence,[194] and holding that unpremeditated murder was a lesser included offense of felony murder.[195] It is not surprising that errors still occasionally occur when the difficulty of applying these tests is recognized.

Another problem facing the law officer in this context is the necessity of determining when a lesser included offense is put in issue by the evidence, thus requiring instructions thereon.[196] This issue is particularly puzzling in cases in which the offense charged requires proof of a specific intent and the accused introduces evidence indicating that he was intoxicated at the time of the commission of the crime. Of course, if the accused was intoxicated to the extent that he was incapable of forming the specific intent necessary for the offense charged, he cannot be guilty of that offense but may be guilty of some lesser offense not involving such an intent. Whether the law officer should instruct on the elements of the lesser included offense would appear to depend upon the degree of intoxication established by the accused. An entire field of law has developed governing when the requisite degree of intoxication has been established.[197] And *United States* v. *Jackson*[198] demonstrates that where two accused are jointly tried, different lesser included offenses may be raised as to each.

Perhaps the most difficult duty imposed on the law officer is the requirement that he instruct the court-martial on the meaning and effect of certain affirmative defenses reasonably raised by the evidence even in the absence of a defense request for these instructions. The necessity of instructing on affirmative defenses must be determined initially by the law officer in the exercise of his sound discretion.[199] Exactly which defenses must be the subject of *sua sponte* instructions is not clear. However, the Court has indicated that partial or complete defenses such as intoxication,[200] lack of knowledge,[201] self-defense,[202] insanity,[203] partial mental responsi-

194 U.S. v. Craig, 2 USCMA 650, 10 CMR 148 (1953).
195 U.S. v. Davis, 2 USCMA 505, 10 CMR 3 (1953).
196 *E.g.*, U.S. v. Swain, 8 USCMA 387, 24 CMR 197 (1957).
197 U.S. v. Dison, 8 USCMA 616, 26 CMR 120 (1958); U.S. v. Christensen, 4 USCMA 22, 15 CMR 22 (1954); U.S. v. Benavides, 2 USCMA 226, 8 CMR 26 (1953).
198 6 USCMA 193, 19 CMR 319 (1955).
199 U.S. v. Morphis, 7 USCMA 748, 23 CMR 212 (1957).
200 U.S. v. Miller, 2 USCMA 194, 7 CMR 70 (1953).
201 U.S. v. Wallace, 2 USCMA 595, 10 CMR 93 (1953).
202 U.S. v. Ginn, 1 USCMA 453, 4 CMR 45 (1952).
203 U.S. v. Burns, 2 USCMA 400, 9 CMR 30 (1953).

bility,[204] physical incapacity,[205] and financial incapacity,[206] where put in issue, must be the subject of appropriate instructions. Where a charge sheet shows on its face that the statute of limitations has run against an offense charged thereon and there is no indication that the accused is aware of his right to plead the statute in bar of prosecution, the law officer errs if he fails to advise the accused of this right.[207] Other defenses such as alibi,[208] the effect of character evidence,[209] and, possibly, accident[210] do not have to be instructed upon in the absence of a request. If, however, a defense counsel requests an instruction on some matter raised by the evidence which is not covered by instructions and the request is not misleading, a refusal by the law officer to grant the request may constitute an abuse of discretion. Thus, cases have been reversed where law officers refused to give an instruction which was substantially the converse of an instruction already given,[211] refused to define the term "reasonable doubt,"[212] refused to instruct that accomplice testimony must be received with caution,[213] or refused to instruct on the effect of evidence of accused's good character.[214] Of course, a law officer need not instruct in the exact language of a request if the instruction provided by him on the question at issue contains the substance of the request.[215] Where a law officer gives conflicting instructions on a material issue, one of which is incorrect, the Court has found a rehearing necessary.[216] Of course, all requested instructions do not have to be granted. If the requested instruction is misleading[217] or places undue emphasis on particular items of evidence presented in favor of one of parties,[218] it may be denied.

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204 U.S. v. Kunak, 5 USCMA 346, 17 CMR 346 (1954).

205 U.S. v. Amie, 7 USCMA 514, 22 CMR 304 (1957); U.S. v. Heims, 3 USCMA 418, 12 CMR 174 (1953).

206 U.S. v. Pinkston, 6 USCMA 700, 21 CMR 22 (1956).

207 U.S. v. Rodgers, 8 USCMA 226, 24 CMR 36 (1957).

208 U.S. v. Bigger, 2 USCMA 297, 8 CMR 97 (1953).

209 U.S. v. Schumacher, 2 USCMA 134, 7 CMR 10 (1953).

210 U.S. v. Bull, 3 USCMA 635, 14 CMR 53 (1954).

211 U.S. v. Landrum, 4 USCMA 707, 16 CMR 281 (1954).

212 U.S. v. Offley, 3 USCMA 276, 12 CMR 32 (1953).

213 U.S. v. Bey, 4 USCMA 665, 16 CMR 239 (1954).

214 U.S. v. Phillips, 3 USCMA 137, 11 CMR 137 (1953). See also U.S. v. Harrell, 9 USCMA 279, 26 CMR 59 (1958).

215 U.S. v. Offley, 3 USCMA 276, 12 CMR 32 (1953).

216 U.S. v. Alberico, 7 USCMA 757, 23 CMR 221 (1957).

217 U.S. v. Freeman, 4 USCMA 76, 15 CMR 76 (1954).

218 U.S. v. Harris, 6 USCMA 736, 21 CMR 58 (1956); U.S. v. Dunnahoe, 6 USCMA 746, 21 CMR 67 (1956); U.S. v. Mantooth, 6 USCMA 261, 19 CMR 377 (1955).

Finally, when an issue as to the voluntariness of an accused's statement is reasonably raised by the evidence, the law officer must instruct a tribunal in regard to its duties in considering that statement.[219] Where the voluntariness of an accused's pretrial statement is in issue, it is error for the law officer to instruct to the effect that the voluntariness of the statement is a matter for the court to consider in determining the weight to be given the statement and that the statement should be given weight only to the extent the court believes it to be truthful. A court must be advised that a confession must be rejected completely if it is found to be involuntary.[220]

Some brief comments are necessary on the substantive law of defenses as it has evolved under the Code. It has already been noted that the defense of intoxication is frequently interposed, and the determination of when that defense is reasonably raised by the evidence poses a substantial issue in many cases. Several other defenses deserve consideration.

On the issue of insanity as a defense, the Court has adhered to the "right from wrong" test and the "irresistible impulse" test.[221] It has rejected arguments that a psychopathic personality[222] or simple amnesia[223] absolves an accused from responsibility for criminal acts. The Court has refused to adopt the so-called *Durham* rule which substantially broadens the availability of the defense of insanity.[224] However, in a far-reaching decision in *United States* v. *Kunak*,[225] the Court accepted the view that evidence which falls short of establishing complete mental irresponsibility may nevertheless indicate that an accused is incapable of entertaining a specific intent, and when the offense charged requires proof of such an intent, the accused may assert the defense of partial mental responsibility. For this issue to be raised, an accused must show more than partial mental impairment. There must be evidence from which a court-martial can conclude that an accused's mental condition was of such consequence and degree as to deprive him of the ability to entertain the particular state of mind required for the commission of the offense charged.[226] Evidence that the accused

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219 U.S. v. Minnifield, 9 USCMA 373, 26 CMR 153 (1958).

220 U.S. v. Jones, 7 USCMA 623, 23 CMR 87 (1957).

221 U.S. v. Fleming, 7 USCMA 543, 23 CMR 7 (1957); U.S. v. Smith, 5 USCMA 314, 17 CMR 314 (1954); U.S. v. Trede, 2 USCMA 581, 10 CMR 79 (1953).

222 U.S. v. Johnson, 3 USCMA 725, 14 CMR 143 (1954).

223 U.S. v. Olvera, 4 USCMA 134, 15 CMR 134 (1954).

224 U.S. v. Smith, 6 USCMA 314, 17 CMR 314 (1954).

225 5 USCMA 346, 17 CMR 346 (1954).

employed what amounted to no more than a private moral and ethical code to shape his conduct, although fully aware that this code was at variance with that of society in general, does not raise the issue.[227] The evidence must indicate a character disorder of such nature and severity that it may have interfered with the accused's capacity to entertain the particular mental state in question.[228]

The law of self-defense has remained substantially unchanged under the Code.[229] Attempts to assert a right to "imperfect self-defense" have failed.[230] In *United States* **v.** ***Adams,***[231] where the Court was faced with the question of whether a soldier has a duty to retreat when he is attacked in his tent, the Court held that a soldier's home is the particular place where the necessities of service force him to live, whether a barracks, a tent, or a fox-hole, and that when he retires to his home he has retreated as far as the law demands.

The twin defenses of mistake of fact and ignorance of fact have been frequently asserted. The question of when these defenses are raised has been the subject of considerable litigation, as has been the issue of whether an accused's mistake or ignorance must merely be honest or both honest and reasonable in order to absolve him from criminal responsibility for a particular act.[232] It seems clear that where either knowledge or a specific intent is an integral part of the offense charged, an honest mistake, whether reasonable or not, will be a valid defense to a serviceman.[233] Where a general intent crime is involved, a mistake, to be available as a defense, must be both honest and reasonable.[234]

The gist of the defense of entrapment is the conception of an offense by a government agent and his incitement of the accused to commit that offense so that the latter may be prosecuted. Where

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226 U.S. v. Storey, **9** USCMA **162, 25** CMR **424 (1958).**

227 U.S. v. Gray, **9** USCMA **208, 25** CMR **470 (1958).**

228 U.S. v. Dunnahoe, **6** USCMA **745, 21** CMR **67 (1956).**

229 **U.S.** v. Troglin, **3** USCMA **385, 12** CMR **141 (1953);** US. v. Ginn, **1** USCMA **453, 4** CMR **45 (1952).**

230 U.S. v. Black, **3** USCMA **57, 11** CMR **57 (1953).** See U.S. v. Maxie, **9** USCMA **156, 25** CMR **418 (1968).**

231 **5** USCMA **563, 18** CMR **187 (1955).**

232 U.S. v. Archibald, **5** USCMA **578, 18** CMR **202 (1955);** U.S. v. Rodriguez-Suarez, **4** USCMA **679, 16** CMR **253 (1954);** U.S. v. Short, **4** USCMA **437, 16** CMR **11 (1954)** ; U.S. **v.** Rowan, **4** USCMA **430, 16** CMR **4 (1954).**

233 U.S. v. Taylor, **5** USCMA **775, 19** CMR **71 (1955);** U.S. **v.** Rowan, **4** USCMA **430, 16** CMR **4 (1954).**

234 U.S. v. Bateman, 8 USCMA **88, 23** CMR **312 (1957)** ; U.S. **v.** Holder, **7** USCMA **213, 22** CMR **3 (1956).**

the defense introduces evidence showing such inducement, the prosecution must show that the agent acted under a belief that the law was being violated by the accused.[235] Of course, there is no entrapment where the original suggestion or initiation for the wrongdoing comes from the accused. And this defense is not available to one who denies commission of an offense since the invocation of this defense necessarily assumes that the act charged was committed.[236]

Under the doctrine of res judicata, the acquittal of an accused at his trial for the alleged commission of an offense precludes his subsequent conviction for perjury on the basis of his testimony at the original trial if a flat contradiction of the former acquittal is involved in the subsequent prosecution.[237]

In every case, the question of what quality and quantity of evidence is necessary to raise various issues is presented. It is clear that the testimony of any person, including the accused,[238] and even exculpatory matter appearing in a pretrial statement,[239] is sufficient to raise an issue unless it is inherently improbable or totally unworthy of belief.[240]

The final subject for discussion is the question of the effect of the decisions of the Court of Military Appeals upon the review of court-martial convictions. Any case tried by general court-martial must be acted upon by the officer exercising general court-martial jurisdiction. As part of this review, an accused is entitled to an impartial review by the staff judge advocate. The Court has insisted that this review must not be written by the trial counsel,[241] the law officer,[242] a law officer at a separate trial of a co-accused,[243] or a staff judge advocate whose pretrial determinations in the case were such as to render him no longer impartial.[244] In performing his function of reviewing the record and advising the convening authority as to the action to be taken in regard thereto, the staff judge advocate must employ the same standards that would be

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235 U.S. v. McGlenn, 8 USCMA 286, 24 CMR 96 (1957).
236 U.S. v. Bouie, 9 USCMA 228, 26 CMR 8 (1958).
237 U.S. v. Martin, 8 USCMA 546, 24 CMR 156 (1957).
238 U.S. v. Amie, 7 USCMA 514, 22 CMR 304 (1957); U.S. v. Noe, 7 USCMA 408, 22 CMR 198 (1956).
239 U.S. v. Morphis, 7 USCMA 748, 23 CMR 212 (1957); U.S. v. Johnson, 3 USCMA 209, 11 CMR 209 (1953).
240 U.S. v. Brown, 6 USCMA 237, 19 CMR 363 (1955); U.S. v. Archibald, 5 USCMA 578, 18 CMR 202 (1955).
241 U.S. v. **Coulter,** 3 USCMA 657, 14 CMR 75 (1954); U.S. v. Clisson, 5 USCMA 277, 17 CMR 277 (1954).
242 U.S. v. Crunk, 4 USCMA 290, 15 CMR 290 (1954).
243 U.S. v. Hill, 6 USCMA 599, 20 CMR 315 (1956).
244 U.S. v. Turner, 7 USCMA 38, 21 CMR 164 (1956).

employed by the convening authority in determining the sufficiency of the evidence.[245] Thus, it is error for the staff judge advocate to suggest in his review that either he or the convening authority is bound by the findings of the court-martial on questions of fact.[246] And the Court will require a new review even where the language employed in this respect is merely "ambiguous."[247] A staff judge advocate and a convening authority cannot only look to see if there is sufficient evidence to support findings returned by a court.[248] The convening authority must be convinced also that the evidence of record establishes accused's guilt beyond a reasonable doubt. Where the review of a contested case fails to advise the convening authority of the reviewer's opinion as to the sufficiency of the evidence, it is fatally defective.[249]

The action of a convening authority in affirming a finding of guilty must be based solely on the evidence of record,[250] but action disapproving a finding may be based on collateral matters outside the record. It is error to advise a convening authority that he cannot rely on matter outside the record to set aside a finding of guilty.[251] A convening authority may not lay down a policy of refusing to consider the possibilities of remission or suspension of any punitive discharge,[252] nor may a staff judge advocate advise that a given sentence is appropriate because of military necessity and custom.[253] Although in determining an appropriate sentence a convening authority should give consideration to many factors[254] and may consult a wide range of sources,[255] it is improper for him to consider adverse matter obtained from outside the record without affording the accused an opportunity to rebut or explain the matter.[256] Whether, in disapproving findings of guilty or a sentence, in whole or in part, a convening authority exercises his discretion wisely or ineptly cannot be questioned by subsequent reviewing authorities.[257] And where a new review is required, in acting on the findings or sentence, a convening authority is limited

245 U.S. v. Grice, 8 USCMA 166, 23 CMR 390 (1957).
246 *Ibid.*
247 U.S. v. Johnson, 8 USCMA 173, 23 CMR 397 (1957).
248 U.S. v. Jenkins, 8 USCMA 274, 24 CMR 84 (1957).
249 U.S. v. Fields, 9 USCMA 70, 25 CMR 332 (1958).
250 U.S. v. Duffy, 3 USCMA 20, 11 CMR 20 (1953).
251 U.S. v. Massey, 5 USCMA 514, 18 CMR 138 (1955).
252 U.S. v. Wise, 6 USCMA 472, 20 CMR 188 (1955).
253 U.S. v. Plummer, 7 USCMA 630, 23 CMR 94 (1957).
254 U.S. v. Barrow, 9 USCMA 343, 26 CMR 123 (1958).
255 U.S. v. Lanford, 6 USCMA 371, 20 CMR 87 (1955).
256 U.S. v. Griffin, 8 USCMA 206, 24 CMR 16 (1957); U.S. v. Vara, 8 USCMA 651, 25 CMR 155 (1958).
257 U.S. v. Dean, 7 USCMA 721, 23 CMR 185 (1957).

in what he may approve by the action of the previous convening authority.[258]

The powers and duties of the boards of review have also been defined by our highest appellate tribunal. Under the Code, a board of review may affirm only so much of the findings as it determines to be correct in law and fact.[259] In *United States* v. *Waymire,*[260] pointing out the differences in the powers of a convening authority and a board of review with respect to findings, the Court held that a board of review is under a duty to affirm so much of the findings of guilty as is not affected by error. Thus, a board was held to have exceeded its authority where it set aside certain findings of guilty, without finding them incorrect in law or fact, merely to effect a practical disposition of a case in which the board members were unable to agree on a certain legal issue. A board of review is also duty bound to reduce any sentence it finds to be excessive.[261] It may reduce a life sentence even though the sentence was mandatory at trial level,[262] but, lacking the power of commutation, it may not change a death sentence to life imprisonment without changing the findings serving as the basis of the sentence.[263] A board of review may disapprove all of a given sentence; and once such a determination as to appropriateness has been made, the decision of the board is not subject to review by the Court.[264] The Court had indicated that in acting on findings, except for such matters as insanity [265] and jurisdiction,[266] a board of review may not consider matters outside of the record, even if the accused would be benefited by this procedure.[267] However, in *United States* v. *Roberts,*[268] the Court announced that appellate tribunals could consider matter outside the record which amounts to a supplementary or additional designation of the record even though the formal requirements of a certificate of correction are not met. In acting on the sentence, a board of review may consider as part of the "entire record" matters considered by the convening authority in his action on the sentence even though these matters were not presented at the trial.[269] A majority

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258 *Ibid.*
259 **Art.** 66(c), UCMJ.
260 9 USCMA 252, 26 CMR 32 (1958).
261 U.S. v. Cavallaro, 3 USCMA 653, 14 CMR 71 (1954).
262 U.S. v. Jefferson, 7 USCMA 193, 21 CMR 319 (1956).
263 U.S. v. Freeman, 4 USCMA 76, 15 CMR 76 (1954).
264 U.S. v. Atkins, 8 USCMA 77, 23 CMR 301 (1957).
265 U.S. v. **Burns,** 2 USCMA 400, 9 CMR 30 (1953).
266 U.S. v. Ferguson, 5 USCMA 68, 17 CMR 68 (1954).
267 U.S. v. Whitman, 3 USCMA 179, 11 CMR 179 (1953); U.S. v. Gordon, 2 USCMA 632, 10 CMR 130 (1953).
268 7 USCMA 322, 22 CMR 112 (1956).
269 U.S. v. Lanford, 6 USCMA 371, 20 CMR 87 (1955).

of the members of a board of review constitutes a quorum for the purpose of hearing and determining any matter. When a quorum sits, a board can function legally if its entire membership comprises three or more officers or civilians. In order for that quorum to rule legally, its decisions need only be concurred in by a majority of the members participating.[270] A board of review has jurisdiction to complete appellate processes notwithstanding the fact that an accused has been released from active duty prior to the action of the convening authority.[271] And a board has jurisdiction to entertain a motion for reconsideration of its decision until a petition or certificate for review is filed, or if neither is filed, until the thirty-day period for their filing has elapsed.[272] Although where a board determines that an accused does not possess sufficient mental capacity to understand the nature of appellate proceedings and to cooperate intelligently in his defense it cannot proceed to a consideration of the merits,[273] the question of an accused's mental capacity at the time of trial is viewed as separate from, and preliminary to, any determination of guilt or innocence on the merits; and therefore a board errs where it decides that because the accused is now insane it has no power to determine whether the accused had sufficient mental capacity at the time of his court-martial to stand trial.[274]

The Court of Military Appeals may obtain jurisdiction over a case by the action of any of the Judge Advocates General in certifying a case, by the action of the Court in granting an accused's petition for grant of review, or by mandatory review of cases involving general or flag officers or where the death penalty has been imposed. The Court possesses no fact-finding powers,[275] nor may it concern itself with the appropriateness of an approved sentence if the sentence is within legal limits.[276] The Court will take judicial notice of facts which do not appear in the record, but which were matters of common knowledge to military personnel at the situs of the court-martial.[277] Matters which have been noted include: nature of pressures applied to Americans in Chinese prisoner of war camps in Korea;[278] that extension telephones were in general use when Congress passed the Communications Act;[279] that medical

270 U.S. v. Hangsleben, 8 USCMA 320, 24 CMR 130 (1957).
271 U.S. v. Speller, 8 USCMA 363, 24 CMR 173 (1957).
272 U.S. v. Sparks, 5 USCMA 453, 18 CMR 77 (1955).
273 U.S. v. Korzeniewski, 7 USCMA 314, 22 CMR 104 (1956); U.S. v. Bell, 7 USCMA 744, 23 CMR 208 (1957).
274 U.S. v. Jacks, 8 USCMA 574, 25 CMR 78 (1958).
275 U.S. v. Bunting, 6 USCMA 170, 19 CMR 296 (1955).
276 U.S. v. Keith, 1 USCMA 442, 4 CMR 34 (1952).
277 U.S. v. Weiman, 3 USCMA 216, 11 CMR 216 (1963).
278 U.S. v. Dickenson, 6 USCMA 438, 20 CMR 154 (1955).
279 U.S. v. DeLeon, 5 USCMA 747, 19 CMR 43 (1955).

men are always attached to machine gun platoons when these units are going into combat;[280] and Army regulations governing active duty pay.[281]

In *United States* v. *McCrary*,[282] the Court stated that if there is any substantial evidence of record to support a conviction an appellate court, in the absence of other error, will not set aside the conviction. The Court has also noted that it will not tolerate a conviction based on suspicion, conjecture, or speculation.[283] In determining whether the requisite quantum of evidence is present in a given case, the Court, while recognizing that the court-martial is charged with evaluating credibility, has nevertheless considered all the evidence in a record and not merely that adduced by the prosecution.[284] An accused may not, however, sit idly by after the Government has established a prima facie case. In a number of cases, accused have been required to assume the burden of proceeding with the evidence after a prima facie case has been established.[285] When confronted with the question of variance between pleading and proof, the Court has applied the test employed by the Federal courts, determining (a) whether the accused has been misled to the extent that he has been unable to prepare adequately for trial, and, (b) whether he is fully protected against another prosecution for the same offense.[286]

When the Court has determined that the evidence is sufficient to sustain the conviction but that error has occurred somewhere in the proceedings, it must then determine whether the error requires reversal. Of course, where an accused is able to show a reasonable possibility of specific prejudice, a conviction should not be permitted to stand. Error such as the erroneous admission of evidence and improper argument of trial counsel have been tested by the standard of specific prejudice[287] and convictions affirmed in the absence of actual harm to an accused.[288] The Court has also determined that upon showing the existence of certain errors, accused need not dem-

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280 U.S. v. Cook, 2 USCMA 223, 8 CMR 23 (1953).

281 U.S. v. Addye, 7 USCMA 643, 23 CMR 107 (1957).

282 1 USCMA 1, 1 CMR 1 (1951).

283 U.S. v. O'Neal, 1 USCMA 138, 2 CMR 44 (1952).

284 U.S. v. Williams, 4 USCMA 69, 15 CMR 69 (1954).

285 U.S. v. Blau, 5 USCMA 232, 17 CMR 232 (1954); U.S. v. Gohagen, 2 USCMA 175, 7 CMR 51 (1953). *But* see U.S. v. Soccio, 8 USCMA 477, 25 CMR 287 (1957).

286 U.S. v. Hopf, 1 USCMA 584, 5 CMR 12 (1952).

287 U.S. v. Fleming, 3 USCMA 461, 13 CMR 17 (1953).

288 U.S. v. Williams, 5 USCMA 406, 18 CMR 30 (1955); U.S. v. Brumfield, 4 USCMA 404, 15 CMR 404 (1954); U.S. v. Russell, 3 USCMA 696, 14 CMR 114 (1954).

onstrate the possibility of specific prejudice in order to prevail on appeal. During the early years of the operation of the Code, the doctrines of "military due process" and "general prejudice" achieved prominence. Although the exact meaning of these terms is not clear, it may be said that a violation of "military due process" was viewed as having occurred where there was a violation of certain fundamental rights guaranteed an accused by Congress,[289] and that "general prejudice'' was invoked where there was "an overt departure from some creative and indwelling principle" operative in the area under consideration which did not rise to the level of a violation of "military due process." [290] Although little reference to these terms may be found in recent cases, areas in which no specific prejudice need be shown should be recognized. Thus, the complete failure to instruct the court on the elements of the offense charged,[291] the usurpation of the duties of the law officer by the president of the court,[292] and the violation of rights guaranteed under Article **31** [293] will require reversal even in the face of compelling evidence of guilt. However, the Court has recognized that at least certain errors generally not requiring a showing of specific prejudice may be purged.[294] Thus, apparently a judicial confession [295] or the reduction of a finding to the lowest lesser included offense [296] may result in the purgation of court-created prejudice. The essentially disciplinary nature of doctrines requiring reversal in the absence of specific prejudice may be seen from the fact that in at least one area where the Court originally applied the doctrine of general prejudice, no reversal is now required if the Government can establish that the accused was not prejudiced.[297] LT. JAY D. FISHER.

V. THE POST-TRIAL REVIEW BY THE STAFF JUDGE ADVOCATE

After sporadic treatment for many years, the staff judge advocate **has** lately suffered greatly increased appellate attention by the Court of Military Appeals. Out of approximately the last hundred cases (decided through **30** June 1958), twenty-five have dealt wholly or in part with errors assigned upon the basis of alleged deficiencies in the review. The onslaught of the Court has followed three avenues, with some minor deviations — **(1)** the absence in the post-

289 **U.S. v. Clay, 1 USCMA 74, 1 CMR 74 (1951).**
290 **U.S. v.** Woods, **2 USCMA 203, 8 CMR 3 (1953).**
291 **U.S. v. Clay, 1 USCMA 74, 1 CMR 74 (1951).**
292 **U.S. v. Berry, 1 USCMA 235, 2 CMR 141 (1952).**
293 **U.S. v. Taylor, 5 USCMA 178, 17 CMR 178 (1954).**
294 **U.S. v. Gibson, 3 USCMA 512, 13 CMR 68 (1953).**
295 **U.S. v. Trojanowski, 5 USCMA 305, 17 CMR 305 (1954).**
296 **U.S. v. Gibson, 3 USCMA 512, 13 CMR 68 (1953).**
297 **U.S. v. Allbee, 5 USCMA 448, 18 CMR 72 (1955).**

trial review of one of the formal, required components, **(2)** the tendency of reviewers to drift over into extra-record material either inaccurate or prejudicial to the accused, and **(3)** the appalling repetition of mistakes in advising the convening authority as to the standard of evidentiary sufficiency. Following is a closer look into these areas, with reference to the latest Court cases and with suggestions where appropriate.

The Formal Requisites of the Review

In *United States* v. *Fields,*[298] the Court set out the *minimum* requirements for the post-trial review by breaking down Article 61 of the Uniform Code. The review of every general court-martial case which results in conviction must contain :

(1) A summary of the evidence.
(2) The reviewer's *opinion* as to the adequacy and weight of the evidence.
(3) His opinion as to the effect of any error or irregularity.
(4) A specific recommendation as to action to be taken.
(5) Reasons for both the opinions and recommendations.

Of course, where the accused has either judicially confessed or pleaded guilty, step **(2)** may be abbreviated. It cannot be overemphasized that the staff judge advocate's review "must do more than summarize; it must also advise.'' [299] In a word, the review must contain a reasoned evaluation. *Both* the legal and the factual sufficiency of the evidence must be appraised.[300] The staff judge advocate cannot stop with the mere generality that "the competent evidence is sufficient in law" or "legally sufficient,"[301] but he must continue to make a factual evaluation of the proof against the backdrop of the "reasonable doubt" standard. And he should inform the convening authority that *he* must be satisfied of the accused's guilt beyond a reasonable doubt. Countless reviews have foundered on this last point.

No less important is the additional requirement that the review, specifically the "clemency" paragraph, be "individualized" and not tied to a particular command policy or viewpoint.[302] In *United States* v. *Plummer,*[303] the review came to grief because the staff judge advocate stated therein that as a matter of military necessity

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298 9 USCMA 70, 25 CMR 332 (1958).
299 U.S. v. Flemings, 8 USCMA 729, 25 CMR 233 (1958).
300 U.S. v. Westrich, 9 USCMA 82, 25 CMR 344 (1958); U.S. v. Acker, 9 USCMA 80, 25 CMR 342 (1958) ; U.S. v. Howes, 9 USCMA 78, 25 CMR 340 (1958).
301 U.S. v. Romero, 8 USCMA 524, 25 CMR 28 (1957).
302 U.S. v. Wise, **6** USCMA 472, 20 CMR 188 (1955) ; U.S. v. Peterson, 8 USCMA 241, 24 CMR 51 (1957).
303 7 USCMA 630, 23 CMR 94 (1957).

and custom a barracks thief must be eliminated from the service, and consequently he ignored mentioning whatever clemency factors existed in favor of the accused. This procedure the Court roundly condemned, Chief Judge Quinn asserting that a convening authority cannot be told that he is bound by an inflexible administrative or command policy, but that he must heed the fact that an accused is entitled as *a matter of right* to a careful and individualized review. The staff judge advocate cannot abdicate this function to a higher level; no matter how serious or heinous the offense, there should be an evaluation of clemency potential.[304] There is thus no substitute for an independent and thorough review of the accused's record by the staff judge advocate, even in a guilty plea case; and the less hackneyed and stereotyped his discussion of the accused's merits or deficiencies, the more likelihood that the review will not be challenged on appeal. As will be shown, this is not the only area in which the Court has seemed to prescribe a style as well as a content for the review.

Consideration of Extra-Record Material

But the staff judge advocate is constantly between two fires—if he frequently omits mention or discussion of one of the five requisites above, just as often he may go far the other way and bring in data from outside the record. Such a procedure is certainly not *per se* bad, and the Court has, in fact, endorsed it,[305] subject to the following substantial limitations.

The most serious of these the Court announced in *United States* v. *Griffin*[306] when it said that the convening authority may not consider material adverse to the accused from outside the record of trial without affording the latter an opportunity to rebut or explain the same. Since in practice the convening authority relies heavily on the matter contained in the staff judge advocate's review, the burden falls on the latter to exercise extreme caution in this area. To be deemed "adverse" to the accused, the extra-record matter does not have to refer to the offenses charged;[307] conceivably, prior undocumented hearsay, rumored misbehavior, and barracks gossip which finds its way into the review are all on the condemned list. On the other hand, purely personal impressions of the accused formed either by the staff judge advocate or the accused's commander, such as his appearance, demeanor, sincerity, outward intelligence, are incapable of effective rebuttal and may justifiably be written down.[308]

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304 U.S. v. Papciak, 7 USCMA 412, 22 CMR 202 (1956).
305 U.S. v. Lanford, 6 USCMA 371, 20 CMR 87 (1955).
306 8 USCMA 206, 24 CMR 16 (1957).
307 U.S. v. Payne, 9 USCMA 40, 25 CMR 302 (1968).
308 U.S. v. Sarlouis, 9 USCMA 148, 25 CMR 410 (1958).

The Court has recently suggested a solution to the adverse matter problem, the feasibility of which has yet to be proved.[309] The proposal is that a copy of the post-trial review, or at least the clemency portion thereof, be served upon the accused or his counsel some time prior to the action of the convening authority and early enough so that a reply to the latter may be submitted or a brief filed before the board of review (see Article 38(c)). This certainly seems a safe procedure, and indeed it goes further than the *Griffin* proscription for it would allow the accused to see comments and remarks taken from *within* the record of trial as well. In an even newer case, the Court has repeated its recommendation that some such procedure be followed.[310]

The Court measures the effect of an error in this area by the usual doctrine of prejudice. Thus, in the case of *United States* v. *Taylor*,[311] the Occurrence of an isolated adverse reference in a paragraph containing other adverse matter which accused *did* have the opportunity to rebut was held nonprejudicial, the probabilities being that the convening authority was not swayed by the lone instance of unrebutted extra-record matter. And in *United States* v. *Smith*,[312] the staff judge advocate's favorable recommendation that clemency be granted was deemed to cure any prejudice arising from his previous reference to facts adverse to the accused. Despite these affirmances, staff legal officerswould do well to serve defense counsel with *any* clemency discussion in the review, letting the latter decide whether or not it is "adverse," and then state in the review that opportunity to rebut has been tendered.

An older qualification is that the staff judge advocate must not narrow the convening authority's right to go outside the record in basing a disapproval of findings or in sentence action. In *United States* v. *Massey*,[313] the staff judge advocate told his convening authority not to consider the results of two lie detector tests (one of which had been favorable to the accused). Reaffirming that the convening authority can look to *anything* in disapproving findings, the Court held the advice bad. The Court pointed out that the staff judge advocate may freely express his own conclusions as to the weight of evidence and the import of extra-record matters, he may even advise the convening authority that it would be an "abuse of discretion" to consider such matter, but he penetrates the threshold of error when he creates the impression in his review that the convening authority would *err in law* were he to consider outside facts and information.

309 U.S. v. Vara, 8 USCMA 651, 25 CMR 155 (1958).
310 U.S. v. Smith, 9 USCMA 145, 25 CBIR 407 (1958).
311 9 USCMA 34, 25 CMR 296 (1958).
312 9 USCMA 145, 25 CMR 407 (1958).
313 5 USCMA 514.18 CMR 138 (19553.

If a staff judge advocate cannot limit the convening authority's field of vision on review, the obverse question is whether he must assist his superior by broadening and bringing to his attention such extra-record material. In *United States* **v.** *Martin,*[314] dealing again with lie detector tests, the Court held that the staff judge advocate has *no affirmative duty* to include extra-record material in his review even if favorable to the accused. The insuperable burden such a requirement would impose is obvious, for it would make a roving field investigator out of the staff judge advocate. The Court went on to lay down a rather vague rule of thumb, which must be accepted for it is the only guidance extant in this area :

(1) It is entirely within the discretion of the staff judge advocate whether to include in his review any extra-record material favorable to the accused. He is not an investigator, need not seek out such information, and is not charged with supplementing the fact-finding powers of the court-martial.

(2) But where the nature of the extraneous matter is of such quantity and quality and from such a reputable source that silence would "possibly result in a miscarriage of justice," [315] then the staff judge advocate will be expected to call it to the attention of the convening authority.

All this is another way of saying that while the staff judge advocate has broad discretion to include matter over and above the five formal requisites, the discretion is reviewable by the Court. Seldom, though, will reversal follow unless "substantial justice" is not done.

In summarizing this area, the only positive command is that the staff judge advocate *not exclude* or expressly deny the convening authority's right to consider outside material and that he tender opportunity to rebut such material as is adverse to the accused and included in the review. He may or may not *include* whatever extra-record matter, favorable or unfavorable, he thinks relevant, and the choice here will often depend on the complexity of the record and the reliability and importance of the data involved, As yet, we have few clues to go by outside of the above-mentioned rule of thumb. In one instance, *United States* v. *Fields,*[316] the Court said it would be pure ritual for the staff judge advocate to refer to such things as the convening authority's power to disapprove findings for any reason, a power any knowledgeable convening authority should be aware of anyway.

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314 9 USCMA 84, 25 CMR 346 (1958).

315 *Id.* at 87, 25 CMR 349.

316 9 USCMA 70, 25 CMR 332 (1958).

Advice to the Convening Authority On the Standard of Evidence

Here is a real trouble spot, and many a worthy legal officer has seen his recital of the standard of evidentiary sufficiency shot through and through on appellate review. As already stated, an opinion as to evidentiary sufficiency both *in law and fact* must be given the convening authority, with reasons.[317] In *United States* v. *Grice,*[318] the Court observed that the staff judge advocate cannot consider himself or the convening authority bound by the court-martial's finding of fact, but must advise the convening authority that he too is a fact-finder, And he must give the convening authority the standard of fact sufficiency—that of "reasonable doubt."[319] This is no place for stylistic language, for the Court seems to be holding "ambiguous" almost every statement the least bit deviant from the "reasonable doubt" rule; and, of course, "ambiguous" language is reversible language when the post-trial review is involved, As illustrative of the extremes the situation has come to, the Court in *United States* v. *Jenkins*[320] reviewed a statement that "the competent evidence establishes that the findings of guilty are correct in law and fact" and sent the case back for a new review and action. In *United States* v. *Romero,*[321] language in the review to the effect that "the record of trial is legally sufficient to support the findings and sentence" was enough to cause return. Any language which merely states that the findings are supported by "evidence" or "competent evidence" is bad. Hereafter, the safe staff judge advocate will be the one that **(1)** shows *he* uses the reasonable doubt standard of fact sufficiency in giving his opinion to the convening authority, and **(2)** tells the convening authority to measure the evidence by the same calipers. The staff judge advocate should positively *give* this standard to the convening authority, for despite the protestative dissents of Judge Latimer, it would seem that the words "reasonable doubt" have now acquired a magical meaning. Reviewers should also beware of using the language "the court saw and heard the witnesses . . . thus, the court's determination should not be disturbed." This precise advice was stricken in *United States* v. *Katzenberger.*[322]

Where bad advice on the standard of evidence is present in a review, correct language of "reasonable doubt" elsewhere in the same

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317 U.S. **v. Westrich, 9 USCMA 82, 25 CMR 344 (1958).**
318 *8* **USCMA 166, 23 CMR 390 (1957).**
319 **U.S. v. Newman, 8 USCMA 615, 25 CMR 119 (1958); U.S.** v. **Jenkins, 8 USCMA 274, 24 CMR 84 (1957).**
320 ***Ibid.***
321 **8 USCMA 524, 25 CMR 28 (1957).** *See* **also U.S. v. Johnson,** *9* USCMA **150, 25 CMR 412 (1958).**
322 **8 USCMA** 497, 24 CMR **307** (1957).

review seldom changes the situation. The Court has held that where the advice is misleading as to one offense and correct as to another the review is still defective since the offenses are considered separately by the convening authority.[323]

Impartiality of the Staff Judge Advocate

One other case dealing with a somewhat different problem deserves classification as a "landmark," though a regrettable one. In *United States* v. *Kennedy*,[324] the law officer, trial counsel, and the staff judge advocate all "got into the act" during trial and seemed to collaborate on reaching the desired conviction. The particular vice of the staff judge advocate appeared to be that *during* the proceedings he consulted the convening authority as to his wishes, directed the trial counsel to ask for a continuance (because the leading prosecution witness proved hostile and refused to testify), and saw that a defense counsel (who served as a prosecution conduit) was appointed for the witness before charges were preferred against him. The Court held that after these activities, an impartial review of the case by the same staff judge advocate would have been impossible. Had that officer accomplished these same objectives, the appointment of counsel, the consultation with the convening authority, *before* trial, objection could hardly be made; but once the proceedings commenced, the same activities assumed much larger proportions not at all short of interference. LT. JOHN E. RIECKER.

VI. INEFFECTIVE TRIAL REPRESENTATION AS A GROUND FOR COURT-MARTIAL REVERSAL

The military's unique system of separate trial and appellate defense teams has inspired more frequent assertions on appeal of ineffective trial representation than are encountered in the civilian practice. The United States Court of Military Appeals was at first reluctant to lend its offices, in the absence of a strong factual showing by the appellant, to what is often no more than an eleventh-hour gambit. This attitude comported with that of appellate courts in the civilian judicial system. More recently, however, the Court has grown increasingly receptive to appellants' claims of ineffective trial representation; especially has this been so in cases involving the death sentence. A chronological review of the cases confirms the foregoing analysis.

United States v. *Hunter*[325] was a rape-murder case in which the

323 U.S. v. Morris, 8 USCMA 766, 25 CMR 259 (1958).
324 8 USCMA 251, 24 CMR 61 (1957).
325 2 USCMA 37, 6 CMR 37 (1952).

death sentence had been adjudged, The appellant advanced a generalized assertion that his trial defense counsel—a captain in the Judge Advocate General's Corps—had been unqualified in the law. The Court of Military Appeals declared that "while it is realized that statutory requirements do not assure trial competency they do require knowledge of the law." [326] The Court concluded from a reading of the record, however, that Hunter's counsel had been well versed in the law. Observing realistically that it is impossible in the military to furnish every accused with "a mature and experienced trial lawyer," [327] the Court announced that "the best that can be done is to assure appointment of officers who are reasonably well qualified to protect their substantial rights." [328] The Court was cognizant that the case before it involved the death penalty and indicated that counsel should be especially zealous in such cases. But, said the Court, in the absence of a factual showing by the appellant "we must assume that defense counsel performed their duties diligently." [329] The Court erected a standard against which all claims of ineffective trial representation were to be measured:

> "[A]n accused, if he contends his rights have not been fully protected, must reasonably show that the proceedings by which he was convicted were so erroneous as to constitute a ridiculous and empty gesture, or were so tainted with negligence or wrongful motives on the part of his counsel as to manifest a complete absence of judicial character." [330]

A unanimous Court agreed that "this principle must be strictly adhered to." [331] In sum, the Court of Military Appeals decreed that a presumption of regularity would support trial defense counsel against generalized averments of incompetence. Moreover, the Court announced that the factual showing incumbent upon complaining accused must be potent and unequivocal.

United States v. ***Wilson*** [332] involved a joint trial of two accused for premeditated murder. The regularly appointed trial defense counsel had consulted with his clients only once prior to trial and then for only a period of some ten minutes. The appellants consequently argued that they had been "denied their right to counsel." [333] Judge Brosman, writing for a majority of the Court of Military Appeals, stated that such an argument "overvalues the utility of

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326 **Id.** at 41, 6 CMR 41.

327 *Ibid.*

328 *Ibid.*, **citing** Conley **v. Cox, 138** F.2d 786 **(8th Cir. 1943)**

329 *Id.* **at 42, 6 CMR 42.**

330 *Id.* **at 41,** *6* **CMR 41.**

331 *Ibid.*

332 **2 USCMA 248, 8 CMR 48 (1953).**

333 *Id.* **at 253, 8 CMR 53.**

interviews between accused and counsel." [334] He pointed out that most of counsel's time is spent outside the presence of the client in a search for evidence. "Once defense counsel has his client's complete story—and this need take but little time in many cases, and almost certainly in this one—there may well be no need for further conference before trial." [335] The Court went on to point out in *Wilson* that no prejudice to the accused was apparent on the record.

In *United* States v. *Bigger*,[336] the Court expressly reaffirmed its stringent *Hunter* test, quoted above. Bigger had been tried for murder. On appeal he made sweeping charges that his trial defense counsel's "failure to conduct his defense properly constituted a denial of due process of law." [337] The appellant claimed, among other things, that his trial defense counsel had consulted with him only once prior to trial, had improperly stipulated to a ballistic expert's prosecution testimony, had failed to call certain defense witnesses, had employed an "inept trial technique," and had conducted "improper questioning." [338] The Court, however, observed that none of these charges was supported by evidence; its examination of the record led the Court to believe that counsel had made the most of what he had. It unhesitatingly reasserted its *Hunter* test, adding that "the most we can command is that they well and truly, and within their capabilities represent the accused." [339] The Court declined to employ hindsight in an effort to second-guess trial tactics. And once more the Court indicated that a claim of ineffective trial representation must be buttressed by a strong factual showing.[340]

Again, in *United States* v. *Day*,[341] the Court of Military Appeals was undismayed by a claim of ineffective trial representation asserted in the context of a capital case. The accused had been convicted of murder, among other crimes, and had been sentenced to the extreme penalty. He claimed on appeal that his trial defense counsel had prejudiced him; this assertion was supported only by the appellant's collection of suggested alternative trial tactics. The Court for the second time put its faith in the *Hunter* test and announced that the appellant's trial defense counsel had passed that test. "To hold there was a denial of due process would permit this

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334 *Zbid.*
335 *Ibid.*
336 **2 USCMA 297, 8 CMR 97** (1953).
337 *Id.* **at 301, 8 CMR 101.**
338 *Zbid.*
339 *Id.* **at 302,** *8* **CMR 102.**
340 **See also the decision of the board of review, CM 348270, Bigger, 8 CMR 248, 253–54 (1952).**
341 **2 USCMA 416,** 9 **CMR 46** (1953).

assignment of error to be sustained merely because appellate counsel could suggest different tactics than those used by trial counsel." [342]

In *United States* v. *Sizemore,*[343] however, the trial defense counsel —with a strong assist from the law officer—failed the *Hunter* test. Sizemore was convicted of murder and sentenced to life imprisonment, His trial defense counsel had asked for a ten-minute recess during which he might organize his final argument on the merits. The law officer refused this request and the trial defense counsel consequently declined to make any argument at all. In holding that the *law officer's* conduct was prejudicially erroneous, the Court said that the right "and duty" [344] of defense counsel to present a closing argument was not to be brushed lightly aside :

> ". . . . If . . . {trial defense counsel makes no argument] there is a danger that the court may not understand or appreciate the defense theory. It is no exaggeration to say that many criminal cases are won for the accused in the course of closing argument. This is an important part of the protection guaranteed by the requirement that an accused in a criminal case be represented by counsel." [345]

Indeed, the Court went further and condemned the *trial defense counsel's* conduct, stating that the law officer's error "was compounded and resulted in substantial prejudice to the accused when defense failed to provide the full measure of representation by not presenting final argument." [346]

Another trial defense counsel failed the *Hunter* test in *United States* v. *Walker.*[347] In that murder case, the civilian individual defense counsel had presented the court-martial with a defense theory which, if accepted, would have secured the accused's acquittal. Much to individual counsel's surprise, the regularly appointed military defense counsel subsequently arose, admitted the accused's guilt, and pleaded for mercy. The Court held that the appointed counsel's conduct was, "at the very least, so grossly negligent as to come within the exceptional situation recognized in the Hunter case." [348]

The Court of Military Appeals' increasing sensitivity in death cases is graphically illustrated by the opinions filed in the case of

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342 *Id.* at 427, 9 CMR 57.
343 2 USCMA 572, 10 CMR 70 (1953).
344 *Id. at* 574, 10 CMR 72.
345 *Zbid.*
346 *Id.* at 575, 10 CMR 73.
347 3 USCMA 355, 12 CMR 111 (1953)
348 *Id.* at 359, 12 CMR 115.

United States v. *Parker*.[349] Parker had been convicted of rape and sentenced to death. Judge Latimer, for a majority, felt that the accused's trial had been "a proceeding so shallow and synthetic as to amount to an empty and hollow ritual." [350] He first concluded that the accused had not been accorded a proper Article 32 investigation. Next, he observed that the accused's case had been brought to trial with unseemly haste. And finally, testing the trial defense counsel's performance against the *Hunter-Bigger* standard, *supra*, Judge Latimer concluded that counsel had failed "to meet the minimal standards of representation *in* a *capital case.*" [351] The author Judge "sensed" that trial defense counsel had not consulted with the prosecution's witnesses before trial.[352] He found "a total lack of the tactics and technique usually employed by defending counsel in criminal cases." [353] He pointed to the absence *of* any *voir dire* examination even though this was a court specially appointed for the trial of the accused's case. Judge Latimer noted that the trial defense counsel had made only two objections during the course of the trial, had requested no instructions, had taken no exception to those given, and had introduced no evidence on the merits. The Judge did not suggest whether there was anything else to object to, any additional instructions required, anything wrong with those given, or any available defense evidence on the merits. Lastly, Judge Latimer noted that trial defense counsel had made no argument in an effort to avoid the death penalty. This, said he, was "the most critical failure of all." [354]

Judge Brosman concurred in *Parker* on the theory that Parker's case presented "an accumulation of deficiencies." [355] Judge Brosman did not, however, feel "that the record reveals quite as dark a picture" as did Judge Latimer.[356] Chief Judge Quinn registered a dissent, arguing that the majority's charge of ineffective trial representation was purely speculative. Said the Chief Judge, "I have a feeling that the majority is disturbed by the death sentence." [357]

A case out of the same mold as *Parker* is *United States* v. *McMahan*.[358] In this murder case, the death eentence had been passed. The Court of Military Appeals, reversing, located a plethora of deficiencies on the part of the trial defense counsel. The author

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349 6 USCMA 75, 19 CMR 201 (1955).
350 *Id.* at 81, 19 CMR 207.
351 *Id.* at 87, 19 CMR 213 (emphasis added).
352 *Id.* at 86, 19 CMR 212.
353 *Ibid.*
354 *Ibid.*
355 *Id.* at 88, 19 CMR 214.
356 *Ibid.*
357 *Id.* at 91, 19 CMR 217.
358 6 USCMA 709, 21 CMR 31 (1956).

of the Court's opinion, again Judge Latimer, concluded that the trial defense counsel had come unprepared to trial. He noted that counsel had made no effort to *voir dire* his client's specially appointed court-martial, had not countered the trial counsel's vigorous opening statement, and had made no closing argument. The Judge was particularly critical of the trial defense counsel's failure to present a closing argument, an omission the gravity of which was accentuated by defense counsel's earlier silence. Citing *Sizemore, supra,* Judge Latimer referred to counsel's "duty" to argue on the merits359 and equated his failure to do so in a capital case with the forbidden plea of guilty.[360] Finally, Judge Latimer excoriated trial defense counsel for his failure to offer any evidence in extenuation and mitigation and his omission of an argument on sentence. The nub of the Court's opinion was that counsel in a capital case *must* say something both on the merits and on the sentence.[361]

The case of *United States* v. *Lovett* [362] brought before the Court a new facet of the representation problem. There the Court held that the appellant had been denied effective assistance of counsel where his trial defense counsel had previously served as defense counsel at the trial of a co-actor who became the principle prosecution witness at the appellant's trial. The Court, through Chief Judge Quinn, declared that "the fact that in another case a defense lawyer represents a Government witness against the accused does not by itself justify a conclusion that the accused was denied effective legal assistance." [363] Inquiry, held the Court, can be made to determine whether the relationship was such as to restrict trial defense counsel's efforts on behalf of the accused. In *Lovett,* the Court deemed it clear that trial defense counsel's loyalties were divided. "Counsel must not represent conflicting interests." [364]

Judge Latimer, concurring in *Lovett,* would have returned the record to a board of review "to take evidence on the issue [of ineffective trial representation] and then make appropriate findings." [365] The Judge's recommendation was to prove prophetic.[366]

359 Id. at 721, 21 CMR 43.

360 *Ibid.* See Art. 45(b), UCMJ. Cf. U.S. v. McFarlane, *supra.*

361 Chief Judge Quinn would have affirmed a finding of guilty of unpremeditated murder but joined with Judge Latimer's order of rehearing "to effect a practical disposition of the case." Id. at 723, 21 CMR 45. (The McMahan case was decided by a two-judge Court subsequent to the death of Judge Brosman and prior to the appointment of Judge Ferguson.)

362 7 USCMA 704, 23 CMR 168 (1957).

363 Id. at 707, 23 CMR 171.

364 *Ibid.*

365 Id. at 712, 23 CMR 176.

366 See, *e.g.,* U.S. v. Allen, *infra.*

United States v. *Thornton*[367] followed fast on the heels of *Lovett*. Thornton had been convicted, among other offenses, of having been a receiver of stolen goods. At his trial, there testified a man who previously had been convicted of the theft and sale of the goods in question. In the course of his testimony, this witness identified the defense counsel as having been counsel for the defense at the former's trial. Following *Lovett*, a divided Court of Military Appeals reversed. The potential for prejudice is too great, said Judge Ferguson, where counsel has previously entered into an attorney-client relationship with a key prosecution witness. Echoing *Lovetf*, the Judge declared that "the orderly administration of justice requires that an attorney not be placed in a position where he must choose between conflicting interests."[368] But, mindful that in *Lovett* the Court had disavowed an intent to import a general prejudice concept, Judge Ferguson in *Thornton* instituted a search for specific prejudice. He pointed to the trial defense counsel's failure to cross-examine his former client on certain subjects and noted that the lawyer's dual status permitted the prosecutor to imply that the former client would tend to give favorable but false answers to the trial defense counsel. To the Government's contention that the record revealed effective representation, the Court responded cryptically that "the test is not whether counsel could have done *more* by way of further cross-examination or impeachment of his former client, but whether he did *less* as a result of his former participation."[369] Then, seemingly dissatisfied with the fruits of its quest for specific prejudice, the Court delivered a brief lecture on the importance of avoiding "the appearance of evil."[370] The Court concluded by indicating that a fully informed accused could consent to representation by a defense counsel whose former client might turn up as a prosecution witness. Judge Ferguson adverted to a simple procedure which might well have dictated a different result in *Thornton:*

> ". . . . Good practice demands that such disclosures be made a matter of record and brought to the attention of the law officer prior to arraignment so that the latter may assure himself the accused is fully cognizant of the limitations and restrictions placed upon his counsel."[371]

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367 8 USCMA 57, 23 CMR 281 (1957).

368 *Id.* at 60, 23 CMR 284.

369 *Id.* at 61, 23 CMR 285.

370 *Ibid.*

371 *Zbid.* Subsequent to its decision in Thornton, the Court of Military Appeals summarily reversed the case of U.S. v. Eskridge, 8 USCMA 261, 24 CMR 71 (1957), on the authority of Lovett, *supra*, and Thornton. See also U.S. v. Moore, 9 USCMA 284, 26 CMR 64 (1958).

With *United States* v. *McFarlane,*[372] the Court of Military Appeals returned to the sensitive field of trial representation in capital cases. In that murder case, the Court concluded, first, that the trial defense counsel had violated Article 45(b) of the Uniform Code of Military Justice by asking for an instruction to the effect that that article precluded a plea of guilty to a capital charge. This indirect attempt at a prohibited plea of guilty was held by the Court to have deprived the accused of a fair trial. The Court also indicated in *dicta* that the accused had not had the effective assistance of counsel. The defense's apparent strategy had been to rely exclusively upon evidence in extenuation and mitigation; the Court, however, was of the opinion that counsel had not taken sufficient time to develop such evidence. In fact, the Court felt that the record dictated further psychiatric investigation with an eye to a complete defense, Moreover, Chief Judge Quinn, concurring, thought that trial defense counsel should have moved for a change of venue since emotion against the accused had apparently been running high in the locale of his trial. In summation, the Chief Judge announced that "defense counsel here conceded everything, explored nothing, was unprepared on every issue, and made the least of what he had." [373]

Having previously attacked defense counsel's failure to argue on the merits or on the sentence in capital cases, the Court recently turned to noncapital cases in which no argument on sentence was interposed. In so doing, the Court has taken a long step away from its early rule that a claim of ineffective trial representation requires potent factual support. In *United States* v. *Allen,*[374] the accused had pleaded guilty to desertion. During the post-findings procedures, he remained silent and his defense counsel made neither an unsworn statement nor an argument in his behalf. Some matters in mitigation which were available but which were not presented to the court-martial appeared in the staff judge advocate's review of the accused's case. Other matters appeared in an affidavit of the accused in support of his claim that he had been deprived of effective assistance of counsel. The trial defense counsel countered the accused's charges with an affidavit of his own. The Court of Military Appeals stated that there could be no hard and fast test of trial defense counsel's effectiveness; each case, the Court announced, must turn on its own facts. Here, said the majority, the accused had been ineffectively represented if his affidavit were believed and effectively represented if his counsel's affidavit were

372 8 USCMA 96, 23 CMR 320 (1957).

373 *Id.* at 100, 23 CMR 524.

374 8 USCMA 504, 25 CMR 8 (1957).

credited. In an unprecedented ruling, the Court determined that the record should be returned to a board of review with directions that the factual dispute be heard and resolved.[375]

In *United States* v. *Friborg*,[376] the Court demonstrated its willingness to discriminate between variant factual situations. There the accused had pleaded guilty in a noncapital case. His trial defense counsel had obtained a favorable stipulation of facta Counsel's client was a chronic offender. The law officer had instructed that a plea of guilty could itself be considered as a mitigating factor. From these facts, the Court concluded that the accused and his defense counsel had "decided advisedly to make no statement and to take a chance on the sentence." [377]

A few generalizations can be drawn from the foregoing case-analysis. The Court of Military Appeals is currently either withdrawing from the restrictive test enunciated in *Hunter, supra,* or is becoming increasingly willing to hold that comparatively minor derelictions bring counsel within *Hunter's* sweep. Moreover, the Court is growing ever more demanding of defense counsel in capital cases. Finally, the present trend in the Court's thinking renders it imperative that records of trial unequivocally reflect the reasons underlying defense counsel's election not to take full advantage of every right which military law accords accused persons. Overlaying all is the obvious teaching that, wherever possible, accused persons should be provided with counsel who possess the ability and experience as well as the zeal which is essential to effective practice at the criminal bar. LT. JON R. WALTZ.

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375 ***Accord,*** U.S. v. Armell, 8 USCMA 513, **25** CMR 17 **(1957)** ; U.S. v. Elkins, 8 USCMA **611, 25** CMR **115 (1958).**

376 **8** USCMA **515,** 25 CMR 19 **(1957).**

377 *Id.* at **615, 516, 25** CMR **19, 20.** ***Accord,*** U.S. v. Williams, 8 USCMA 552, **25** CMR **56 (19.57).**

[010.6 (30 Sep **58)**]

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